(1)

Supreme Court, U.S.
FILED

NO. 98 1337 FEB 18 1999

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

FRANK WAGNER

Petitioner,

vs.

JAMES P. CELEBREZZE, et al.

Respondents.

Petition For A Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL MURRAY
(Counsel of Record)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorneys for Petitioner

Of Counsel:
BROOKE F. KOCAB
BERKMAN, GORDON, MURRAY & DEVAN
PATRICK M. FLANAGAN
SAVOY, BILANCINI, FLANAGAN & KENNEALLY

64PP

QUESTIONS PRESENTED FOR REVIEW

For over three years, petitioner was employed as a bailiff for the respondent judge who sat on the Court of Common Pleas, Domestic Relations Division, for Cuyahoga County, Ohio. Petitioner ran for one of the ward leader positions in the suburb of Cleveland in which he lived. In furtherance of an agreement with the respondent mayor of that suburb to help the judge's brother, who was a candidate for judge of the state court of appeals, the respondent judge directed petitioner to withdraw as a candidate for ward leader and sign a letter supporting his opponent. Petitioner withdrew as a candidate, but would not sign the letter because it did not reflect his views and for this refusal was immediately discharged. In his 42 U.S.C. §1983 action for violation of his First Amendment rights, both the district court and the court of appeals held that under this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980), petitioner's discharge was a constitutionally permissible patronage dismissal --

1. In such a case, should petitioner's discharge have been reviewed under the balancing test enunciated in this Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sinderman*, 408 U.S. 593 (1972); and *Connick v. Myers*, 461 U.S. 138 (1983)?

2. Under either test -- the *Pickering* free speech test or the *Branti* political patronage test -- did petitioner's discharge violate his First Amendment rights in view of the fact that his refusal to sign the letter bore no relationship to his job and could not have interfered with the efficient operation of the Domestic Relations Court?

LIST OF PARTIES

The petitioner in this case is Frank Wagner.

The respondents in this case are James P. Celebrezze, individually and in his official capacity as Judge of the Court of Common Pleas, Division of Domestic Relations; Thomas Longo; Frank D. Celebrezze, Court of Common Pleas, Division of Domestic Relations; and the County of Cuyahoga.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT AND REASONS FOR GRANTING THE WRIT 10

I. An Important Question is Presented as to Whether the Analysis Identified in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Connick v. Myers*, 461 U.S. 138 (1983) or That Enunciated in *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976), Should Be Utilized in Reviewing, under the First Amendment, the Discharge of a Public Employee for His Refusal to Succumb to the Demand of His Employer That He Sign a Letter of Support for a Political Candidate He Personally Opposes. 12

TABLE OF CONTENTS (cont'd)

Page

II. An Important Question Is Presented as to Whether, under Either Test, i.e., the Free Speech Analysis Identified in *Pickering* and its Progeny, or the Patronage Dismissal Analysis under *Elrod* and *Branti*, the First Amendment Is Violated When a County Court of Common Pleas Judge Discharges His Bailiff for Refusing to Endorse a Political Candidate in a Municipal Ward Leader Election When the Employee's Refusal Has No Relationship to the Efficient Operation or Effective Functioning of the Court on Which the Judge Sits and Did Not Interfere with the Discharge of the Bailiffs Public Duties. 16

CONCLUSION 19

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit (November 20, 1998)

Judgment Entry of the United States Court of Appeals for the Sixth Circuit (November 20, 1998)

Judgment Entry of the United States District Court for the Northern District of Ohio, Eastern Division (June 26, 1997)

Order of the United States District Court for the Northern District of Ohio, Eastern Division (June 26, 1997)

Memorandum of Opinion and Order of the United States District Court (October 11, 1996)

TABLE OF CONTENTS (cont'd)

Page

Constitution of the United States, amend. I . . . . . App. 36

Constitution of the United States, amend. XIV . . . . . App. 36

42 U.S.C. 1983 . . . . . App. 38

TABLE OF AUTHORITIES

Page

CASES

Branti v. Finkel,
445 U.S. 507 (1980) ..... *passim*

Collins v. Voinovich, No. 97-3154, 1998 U.S. App.
LEXIS 16164, at *8-9 (6th Cir. July 14, 1998) 11

Connick v. Myers, 461 U.S. 138 (1983) ..... i, 9, 10, 12

Elrod v. Burns,
427 U.S. 347 (1976) ..... *passim*

Fazio v. City and County of San Francisco,
125 F.3d 1328 (9th Cir. 1997) 11

Heideman v. Wirsing, 7 F.3d 659 (7th Cir. 1993) 12, 15

Lewis v. Cohen, No. 97-7895, 1999 U.S.
App. LEXIS 585 (2nd Cir. Jan 15, 1999) 11, 15

Marshall v. Porter County Planning Commission,
32 F.3d 1215 (7th Cir. 1994) 12, 15

McEvoy v. Spencer, 124 F.3d 92 (2nd Cir. 1997) 12

O'Hare Truck Service, Inc. v. City of Northlake
___ U.S. ___, 116 S.Ct. 2353 (1996) 13, 15, 16

Perry v. Sinderman, 408 U.S. 593 (1972) ..... i, 8, 10, 12

TABLE OF AUTHORITIES (cont'd)

Page

Pickering v. Board of Education, 391 U.S. 563 (1968) ..... *passim*

Rahn v. Drake Center, 31 F.3d 407 (6th Cir. 1994) 15

CONSTITUTIONAL PROVISION

United States Const., amend I ..... *passim*

United States Const., amend XIV ..... *passim*

STATUTORY AND REGULATORY PROVISION

28 U.S.C. §1254 11

42 U.S.C. §1983 ..... i, 9, 10, 12

PETITION FOR A WRIT OF CERTIORARI

Frank Wagner, petitioner herein, prays that a Writ of Certiorari issue to review the final Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 20, 1998.

OPINIONS BELOW

The judgment entry and opinion of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, entered November 20, 1998, is set forth in the Appendix at App. 1. The final Judgment of the United States District Court for the Northern District of Ohio, Eastern Division, entered June 26, 1997, is set forth in the Appendix at App. 16. The Order of the United States District Court for the Northern District of Ohio, Eastern Division, entered June 26, 1997, is set forth in the Appendix at App. 17. The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, entered October 11, 1996, is set forth in the Appendix at App. 21.

JURISDICTION

The Judgment Entry and Opinion of the United States Court of Appeals for the Sixth Circuit was entered November 20, 1998. App. 1. This Court has jurisdiction to review the final judgment rendered by the United States Court of Appeals for the Sixth Circuit by Writ of Certiorari pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution are set forth in the Appendix at App. 36-38. 42 U.S.C. §1983 is set forth in the appendix at App. 38.

STATEMENT OF THE CASE

Petitioner seeks certiorari review of a Sixth Circuit Court of Appeals decision which affirmed a district court decision granting summary judgment to a public employer on a claim brought by a former employee who asserted he had been discharged for exercising his right to free speech in violation of the First Amendment. In reaching its decision, the lower court assumed the truth of the facts set forth in Frank Wagner's Complaint and in his Affidavit in Support of his Brief in Opposition to the Motion for Summary Judgment. App. at 2. A summary of those facts are set forth below.

Frank Wagner (Wagner) was hired by the Court of Common Pleas, Division of Domestic Relations ("the court") and the County of Cuyahoga, Ohio, on December 3, 1990. One month later, Wagner was assigned to work as a bailiff for Judge James Celebrezze ("the judge"). In his capacity as bailiff, Mr. Wagner performed a myriad of ministerial functions, including tasks such as overseeing the judge's docket, answering phone calls, scheduling attorney conferences, running errands, opening and closing court, calling cases and swearing in witnesses. Mr. Wagner was never disciplined for any reason during his tenure with the Court, and he was a hard-working, diligent and loyal employee.

As a citizen, Mr. Wagner held strong beliefs and was

committed to serving his community. He lived in a suburb of the city of Cleveland called Garfield Heights, Ohio and was a councilman and member of the Garfield Heights School Board when he began his employment in 1990. Wagner ran for the position of Mayor of Garfield Heights, Ohio, opposing Tom Longo ("Longo") in the November 1993 election. Soon after Mr. Wagner announced he was running, Longo approached the judge and requested him to pressure Wagner into withdrawing from the mayoral election. The judge refused Longo's request because he knew he would be interfering with Wagner's constitutional rights if he did so. After a hotly contested race, Mr. Wagner lost the mayoral bid to Longo by a narrow margin.

Not long after the loss to Longo, Wagner announced his candidacy for the position of Ward Leader in Garfield Heights, Ohio. Wagner's opponent was a woman by the name of Rose Lovano ("Lovano"). Longo, who had beaten Wagner in the mayoral race, desired Wagner's removal from Garfield Heights politics, and vocally supported Lovano.

In December of 1993, the judge's brother, Frank Celebrezze, announced his candidacy for Court of Appeals Judge in the Eighth Appellate Judicial District, Cuyahoga County, Ohio. In mid-March 1994, Longo advised the judge and Frank Celebrezze that he would find someone to oppose Frank Celebrezze's candidacy unless Wagner was forced out of politics in Garfield Heights. Longo agreed not to find a candidate to oppose Frank Celebrezze in the Court of Appeals race if Wagner withdrew from the Ward Leader race and announced his support for Lovano. The judge and his brother agreed to obtain Wagner's cooperation.

On April 7, 1994, the judge told Wagner to discontinue his campaign for Ward Leader, to divorce himself from Garfield

Heights politics, and to vocalize his support for Lovano in the Ward Leader race. Wagner agreed to withdraw from the Ward Leader race, but refused to vocalize his support for Lovano because he disagreed with her political views.

Several weeks later, the judge asked his scheduler to type a letter directed to Lovano for Wagner's signature. The letter was a statement of political support for Lovano's candidacy for the Ward Leader position and stated:

> Just a brief note to let you know that whatever the outcome of the next Tuesday's election, I will do all in my power to see my people and I support you in remaining Ward Leader of Garfield Heights.

The judge then called Wagner into his office and told him to sign the letter. Wagner advised the judge that he objected to signing the letter because it did not express his political views or beliefs, and in fact, was contrary to what he believed. The judge, however, told Wagner that he and his brother had made a commitment to Longo, and as a result, Wagner could either sign the letter or lose his job.

Wagner realized a problem was developing between him and the judge over his refusal to support Lovano, so he began to tape record his conversations with the judge.[1] That evening Wagner called the judge at home to discuss his refusal to sign the letter. During their conversation, Wagner reiterated that he was willing to withdraw from the Ward Leader race and

---

[1] The tapes were submitted as attachments to Wagner's Affidavit in his Brief in Opposition to the Motion for Summary Judgment in the district court and included recordings of several telephone and in person conversations.

offered to submit a letter to that effect. The judge, however, would accept nothing less than Wagner's signature on the letter he had drafted that morning. The following conversation took place:

WAGNER: . . . Hey, I just wanted to talk to you a little bit more. Do you think--I was thinking about what we talked about today and you know, regarding the letter and all that crap--instead of signing a letter saying that I will support Rose Lovano, what if I just issue a statement saying that I will not seek nor accept the nomination for ward leader?

JUDGE: No.

WAGNER: That won't suffice?

JUDGE: Nope.

WAGNER: I mean why not, that would do almost the same thing. I mean, I won't do it.

JUDGE: No.

WAGNER: I mean, you, you understand I don't want to lose my job . . . but at the same token I don't wanna give away all my integrity to my people out here either, so I just don't accept . . .

JUDGE: I have made up my mind what I want. I have explained it to you and I do not intend to spend my evening explaining it to you again.

You know what I want, you make your choice. Have a pleasant evening.

The next day, Wagner was called into the judge's office and, after yet another conversation about Wagner's refusal to sign the letter prepared by the judge, and his plea to be permitted to sign a letter that did not conflict with his political views, he was fired. Part of the conversation that took place that day was as follows:

WAGNER: I can't believe you're going to fire me over that stupid letter.

JUDGE: You put me in an untenable position, this is how I get out of it. Your job is, like I told you yesterday and I've told you before, your first job is to get me re-elected--not get me canned. It's just that simple. . . .

WAGNER: I'm not gonna run for Ward Leader Judge.

* * * *

WAGNER: I'm not gonna run--tell me what it is so we can talk about it.

JUDGE: Unless that fucking Rose Lovano gets re-elected I got a major headache.

WAGNER: Okay.

JUDGE: I got no control over you--you don't work for me anymore--Mayor I'm sorry. I did

everything I could--you go out and screw him, if that's what you want--go do it, I'm not changing my mind I told you that three times yesterday--my brother told you that, and I told you that again last night. I told you--I think I've told you enough.

WAGNER: I know.

JUDGE: Period.

WAGNER: What about a different letter? The letter I said that I won't accept the nomination.

JUDGE: That's the letter I want. Excuse me--whose the boss Frank?

WAGNER: You are.

JUDGE: End of subject. Not Lou not anybody else--me.

JUDGE: This is what I wanted--you don't want to do it that's fine. You've got a right, you've got an absolute positive perfect right under the law to do whatever you want. You're not working for me--period. I'm sorry. . . . But you're not staying here. Not today, not tomorrow, you're not staying here, unless that's signed so I can give it to the Mayor. End of subject. I've told you that.

WAGNER: The other letter . . . I even prepared a different

letter if you could look at it. Could you at least look at it please?

JUDGE: No.

Frank Wagner's discharge took effect immediately. Thereafter in October, 1994, Wagner filed a Complaint in the district court against Judge Celebrezze in his individual and official capacities, Frank Celebrezze, Thomas Longo, the County of Cuyahoga and the Court of Common Pleas, Division of Domestic Relations, alleging, among other claims, that his rights under the United States Constitution were violated when, under color of law, he was discharged for exercising his First and Fourteenth Amendment rights to freedom of speech and association.

On March 22, 1995, the judge filed a motion for summary judgment which asserted the First and Fourteenth Amendments had not been violated because Wagner's discharge was a constitutionally permissible political patronage dismissal. The judge also argued that even if the dismissal was unconstitutional under the First Amendment, he was entitled to qualified immunity in any event.

In his response to the motion, Wagner argued he was not discharged because of party affiliation, and therefore, that his discharge was not subject to the patronage dismissal analysis identified *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976), as argued by the defense. Rather, because he was discharged as a result of the affirmative exercise of his First Amendment right to refuse to make a political statement, which was speech on a matter of public concern, he asserted his discharge was to be analyzed under the line of cases governed by *Perry v. Sindermann*, 408 U.S. 593 (1972), *Pickering v. Board of Education*, 391 U.S. 563 (1968),

and *Connick v. Myers*, 461 U.S. 138 (1983). Under that analysis, Wagner argued it was clear that his discharge violated the First Amendment. Wagner further pointed out that even if his discharge was subject to a patronage analysis, a First Amendment violation still resulted because his discharge was not the result of legitimate patronage considerations historically permitted by this Court.

The district court found Wagner's termination did not contravene the First Amendment because it constituted a permissible patronage dismissal. App. at 27-30. As a result, it granted the judge's motion for summary judgment. App. at 35, 16.

Because the legal issues surrounding Mr. Wagner's First and Fourteenth Amendment claims were identical as to all of the remaining defendants, the parties agreed that the court could treat an agreed Stipulation as a Motion for Summary Judgment by the remaining defendants based on all of the same facts and legal authorities except those surrounding the qualified immunity issue. App. at 17. Thereafter, on June 26, 1997, the district court issued an Order which reiterated its previous findings, and further found all other defendants entitled to summary judgment. App. at 16.

Mr. Wagner filed his timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, but that court affirmed. In reaching its decision, the Sixth Circuit, like the district court, reached the erroneous conclusion that Wagner's discharge was to be analyzed under the political patronage line of cases, and therefore, even though it was clearly the result of speech having no connection to the operation of the Domestic Relations Court, was constitutionally permissible. App. at 1-15.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case raises the important question of whether the analysis identified in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Connick v. Myers*, 461 U.S. 138 (1983) or *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976), must be utilized in reviewing, under the First Amendment, the discharge of a public employee for his refusal to succumb to the demand of his employer that he sign a letter of support for a political candidate he personally opposes.

This case raises the further fundamental and important question whether, even under a patronage analysis, a county court of common pleas judge may discharge his bailiff for refusing to endorse a political candidate in a municipal ward leader election when the employee's endorsement of the candidate has no relationship to the efficient operation or effective functioning of the court on which the judge sits.

Here, the lower court committed two fundamental errors: it first erred when it treated Wagner's discharge as a patronage dismissal and analyzed it under this Court's decisions in *Branti* and *Elrod*, when in fact Wagner's discharge was a free speech dismissal which should have been analyzed under *Pickering*, *Perry*, and *Connick*; and, even if it correctly subjected this case to a patronage analysis, it next erred when it concluded that Wagner's discharge was a constitutionally permissible patronage dismissal even though it was in response to his affirmative exercise of the right to free speech and had nothing to do with and had no effect on the efficient operation of the Domestic Relations Court.

If this Court allows the lower court holding to stand, its ruling will have the effect of expanding the power of the government to discharge a public employee for reasons going far beyond the narrow confines of the limited exceptions to the First Amendment rights of public employees previously recognized by this Court.

The Sixth Circuit's holding effectively extends the application of the patronage dismissal analysis identified in *Elrod* and *Branti* to all cases in which a public employee is discharged, whether as a result of his political affiliation, or as a response to the affirmative exercise of his First Amendment rights, even though the speech does not interfere with his job duties and has no connection to the operation of the public office. Indeed, in another recent decision, the Sixth Circuit indicated that the *Branti* exception should be broadly construed in favor of upholding a dismissal in situations where an employee's status as a patronage employee or not, is unclear. *See Collins v. Voinovich*, No. 97-3154, 1998 U.S. App. LEXIS 16164, at *8-9 (6th Cir. July 14, 1998).

The lower court's judgment, however, appears to contradict this Court's previous rulings, and in fact, appears to have contributed to the creation of a split among the Circuit Courts of Appeal. For, while the lower court appears to require the patronage analysis to be applied to almost any discharge rooted in politics, the Second and Seventh Circuits appear to have held the opposite. For instance, in *Lewis v. Cohen*, No. 97-7895, 1999 U.S. App. LEXIS 585 (2nd Cir. Jan 15, 1999), the Second Circuit concluded that where a public employee's "discharge is based on discrete incidents of speech rather than political affiliation, *Pickering*, not *Branti* and *Elrod*, provides the appropriate framework of analysis." (Rejecting opposite view from *Fazio v. City and County of San Francisco*, 125 F.3d 1328

(9th Cir. 1997), and *citing McEvoy v. Spencer*, 124 F.3d 92 (2nd Cir. 1997)). The Seventh Circuit also appears to require the *Pickering* analysis to be employed in reviewing a public employee's discharge in response to his speech. *See Marshall v. Porter County Planning Commission*, 32 F.3d 1215 (7th Cir. 1994); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993).

This Court has not extended the patronage dismissal exception identified in *Elrod* and *Branti* to a setting in which the pubic employee is discharged for specific incidents of speech, and Petitioner urges this Court to accept jurisdiction of this case to make clear that the balancing test identified in the line of cases beginning with *Pickering v. Board of Education* is the appropriate analysis for this situation, and to clarify the confusion currently existing among the lower Circuit courts of appeal.

I. An Important Question is Presented as to Whether the Analysis Identified in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Connick v. Myers*, 461 U.S. 138 (1983) or That Enunciated in *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976), Should Be Utilized in Reviewing, under the First Amendment, the Discharge of a Public Employee for His Refusal to Succumb to the Demand of His Employer That He Sign a Letter of Support for a Political Candidate He Personally Opposes.

Branti and *Elrod* permit a public employee to be discharged as a result of party affiliation when party affiliation is deemed an appropriate requirement for the employee's public position. Historically, the constitutionality of discharges based on party affiliation have arisen in situations where a newly elected

public official fails to hire, rehire or promote a public employee somehow aligned with the opposing party or former administration.

This, however, was not such a case, because Frank Wagner was not discharged by a newly elected public official, and was not discharged because of his membership in the opposing party, affiliation with the opposition or service for the former administration. Rather, this was a case in which Frank Wagner, who had successfully and loyally served as the judge's bailiff for over three and a half years, was discharged because of a specific instance of exercising his First Amendment right to free speech. Here, Frank Wagner was fired for his refusal to sign a letter endorsing a political candidate with whose views he disagreed. Thus, this was not a case in which the discharge was the result of party affiliation as identified in *Elrod* and *Branti*, but rather, this was a case involving the discharge of a public employee in retaliation for affirmatively exercising his First Amendment rights.

Determining the appropriate analysis to be applied in circumstances such as these was most recently addressed by this Court in *O'Hare Truck Service, Inc. v. City of Northlake*, ___ U.S. ___, 116 S.Ct. 2353 (1996). In that case, this Court announced the applicable standards for determining whether or not a hiring decision violates the First and Fourteenth Amendments. The question presented was whether the First Amendment's prohibition against political patronage discharges in public employment settings should be extended to independent contractors. *Id.* at 2356. This Court answered that question in the affirmative, and in doing so, distinguished political patronage cases, which concern political party affiliation and association, from cases involving adverse employment decisions based on the affirmative exercise of

First Amendment rights, which cases require a different First Amendment inquiry.

The Court set forth the standards as follows:

> . . . in *Branti v. Finkel* . . . . we . . . modified the standard, announced in the two opinions supporting the *Elrod* judgment, for assessing when party affiliation, consistent with the First Amendment, may be an acceptable basis for terminating a public employee . . . . "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. . . . 45 U.S., at 518, 100 S.Ct., at 1295.
>
> Our cases call for a different, though related, inquiry where a government employer takes adverse action on account of an employee or service provider's right of free speech. There, we apply the balancing test from *Pickering v. Board of Ed. of Township High School Dist.* 205 Will Cty. . . . . *See generally Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, ___ U.S. at ___ . . . 116 S.Ct. at 2347-2349. *Elrod* and *Branti* involved instances where the raw test of political affiliation sufficed to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the requirement was appropriate for the employment in question . . . . [T]he inquiry is whether the affiliation requirement is a reasonable one . . . . A reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific

> instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable.

O'Hare, 116 S.Ct. at 2357-58. (Emphasis added). *See also Lewis v. Cohen*, No. 97-7895, 1999 U.S. App. LEXIS 585 (2nd Cir. Jan 15, 1999), (where discharge is based on discrete incidents of speech rather than political affiliation, *Pickering*, not *Branti* and *Elrod*, provide the appropriate framework of analysis); *Rahn v. Drake Center*, 31 F.3d 407, 411 (6th Cir. 1994) ("if any part of an employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education*."); *Marshall v. Porter County Planning Commission*, 32 F.3d 1215 (7th Cir. 1994); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993) ("analysis utilized depends on the manner in which the exercise of an employee's First Amendment rights may impede the effective performance of the public office in question.")

Based on *O'Hare*, it appears clear that the lower court was required to employ the balancing test mandated by *Pickering* in reviewing Wagner's discharge, because in this case, the discharge was based on "specific instances of the employee's speech." *O'Hare*, 116 S.Ct. at 2358.

Application of *Pickering's* balancing test to this case would have resulted in the conclusion that Wagner's refusal to endorse Lovano for Ward Leader in Garfield Heights, Ohio was not reasonable and could serve no legitimate governmental interest. Thus application of the *Pickering* balancing test weighed solely in Wagner's favor.

II. An Important Question Is Presented as to Whether, under Either Test, i.e., the Free Speech Analysis Identified in *Pickering* and its Progeny, or the Patronage Dismissal Analysis under *Elrod* and *Branti*, the First Amendment Is Violated When a County Court of Common Pleas Judge Discharges His Bailiff for Refusing to Endorse a Political Candidate in a Municipal Ward Leader Election When the Employee's Refusal Has No Relationship to the Efficient Operation or Effective Functioning of the Court on Which the Judge Sits and Did Not Interfere with the Discharge of the Bailiffs Public Duties.

The constitutionality of political patronage dismissals are governed by a line of cases beginning with *Elrod v. Burns*, 427 U.S. 347 (1976), and ending, thus far, with this Court's most recent pronouncement in *O'Hare Trucking Service, Inc. v. City of Northlake*, ___ U.S. ___, 116 S.Ct. 2353 (1996). In each of those cases, this Court has reviewed the constitutionality of the employment decision in light of the traditional purposes supporting the patronage system in the first place. Specifically, as the Court recognized in *Branti v. Finkel*, 445 U.S. 507 (1980):

> party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. *Id.*, at 366, 96 S.Ct. at 2686. In *Elrod*, it was clear that the duties of the employees - the chief deputy of the process division of the sheriff's office, a process

server, another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County - were not of the character, for they were, as Mr. Justice STEWART stated, "nonpolicymaking, nonconfidential" employees. *Id.*, at 375, 96 S.Ct. at 2690.

As Mr. Justice BRENNAN noted in *Elrod*,

> "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. *Id.* at 367, 96 S.Ct. at 2686 . . . . The ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

445 U.S. at 517-519 (emphasis added).

Applying that standard to this case, the question was whether the respondents could demonstrate that Frank Wagner's private political belief that he did not want to support Rose Lovano in the city of Garfield Heights ward leader race, and his resulting refusal to sign the letter vocalizing his support for her candidacy, would interfere with the discharge of his public duties or the duties of the judge of the Court of Common Pleas, Division of Domestic Relations, in Cuyahoga County, Ohio.

This answer to that question should have been self-evident to the lower courts, because forcing Wagner to sign a statement vocalizing support for a political candidate in a suburban ward leader race certainly could never be deemed

"an appropriate requirement for the effective performance of [Domestic Relations Court]." *Id.*

As the Court pointed out in *Elrod*, 965 S.Ct. at 2684, "care must be taken not to confuse the interest of partisan organizations with government interests. Only the latter will suffice." Thus, given the standard promulgated by this Court, Frank Wagner's discharge should not have fared any better under the political patronage cases, for, if the lower court is correct, and Frank Wagner can be discharged for refusing to succumb to his employer's purely partisan request to express a political viewpoint in an election having nothing to do with the respondent or the efficient operation of his court, then there is no limit to what a public employer can demand his public employee to say.

The error in a lower courts' application of the patronage cases becomes crystal clear when the purpose supporting patronage dismissals is considered. For, as was noted in *Branti*, "patronage discharges are only acceptable in the limited circumstances when political affiliation and loyalty are necessary to the proper and efficient functioning of the political office involved." *Branti*, 445 U.S. at 518. (emphasis added). No evidence of such circumstances was offered in the court below.

The Sixth Circuit erred in concluding Wagner's dismissal was constitutionally permissible under the patronage analysis, and this Court should accept jurisdiction of this case to clarify that *Branti* does not insulate a public employer from §1983 liability when the asserted "political affiliation" basis for the discharge is affirmative speech having no connection to the public office.

CONCLUSION

The decision below was doubly flawed. Not only did the court apply the patronage analysis when it should have applied the *Pickering* analysis, but in applying the patronage cases, it expanded the power of the government employer, exponentially, to discharge an employee for personal political views historically protected by the First Amendment even though those views do not interfere with an employee's duties and have nothing to do with the employer's office.

For these reasons, petitioner, Frank Wagner, respectfully requests this Court to accept this case for review.

J. MICHAEL MURRAY
(Counsel of Record)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorneys for Petitioner

Of Counsel:
BROOKE F. KOCAB
BERKMAN, GORDON, MURRAY & DEVAN
PATRICK M. FLANAGAN
SAVOY, BILANCINI, FLANAGAN & KENNEALLY

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK WAGNER,	*	
	*	
Plaintiff-Appellant,	*	
	*	
v.	*	
	*	
JAMES P. CELEBREZZE, individually and in his official capacity as Judge of the Court of Common Pleas, Division of Domestic Relations; THOMAS LONGO; FRANK D. CELEBREZZE; COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS; COUNTY OF CUYAHOGA	*	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**
	*	(Filed Nov. 20, 1998)
Defendant-Appellees.	*	

BEFORE: SUHRHEINRICH, CLAY, and OAKES,* Circuit Judges.

CLAY, Circuit Judge. Plaintiff-Appellant, Frank Wagner, brought this civil rights action under 42 U.S.C. §§ 1983 and 1988, and Ohio state law, alleging that he was fired from his job as a bailiff for refusing to endorse a candidate for party office backed by his employer, Judge James P. Celebrezze of the County of Cuyahoga Court of Common Pleas, Division of Domestic Relations. Wagner alleges that his termination, without notice, hearing, or other procedural protections,

---

* The Honorable James L. Oakes, Senior Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

violated his right to freedom of speech under the First Amendment and his right to procedural due process under the Fourteenth Amendment. Wagner filed a complaint against Judge Celebrezze in his individual and official capacities; Mayor Thomas Longo of Garfield Heights, Ohio; Frank D. Celebrezze (the Judge's brother); the Court of Common Pleas, Division of Domestic Relations; and the County of Cuyahoga.

The District Court dismissed the suit on summary judgment, finding: (i) that Wagner was a political patronage employee who could be discharged for political reasons; (ii) that Wagner was an at-will employee who lacked any protected property interest in his employment; and (iii) that, in an event, Judge Celebrezze enjoyed qualified immunity from suit. Wagner appealed. We AFFIRM.

I.

In their motions for summary judgment, the defendants accepted as true the allegations in Wagner's complaint and the facts set forth in his affidavit and accompanying documents. For purposes of these motions, this Court shall do the same.

On December 3, 1990, Wagner was hired as a bailiff by the County of Cuyahoga and the Court of Common Pleas, Division of Domestic Relations. After his first month of employment, Wagner was assigned to work for James P. Celebrezze, a judge on that court (hereafter "Judge Celebrezze" or the "Judge"). Wagner's duties as Judge Celebrezze's bailiff including running errands, handling phone calls, screening people who wanted to contact Judge Celebrezze, scheduling hearings and attorney conferences, administering the Judge's docket, opening and closing court, and swearing in witnesses. He did not assist Judge Celebrezze in making legal decisions, attend attorney conferences, or assist in formulating the policies of either the

Domestic Relations Court or Judge Celebrezze's chambers.

When he began working for Judge Celebrezze, Wagner was a member of the Garfield Heights Board of Education. In January 1993, Wagner was considering running for Mayor of Garfield Heights and, before announcing his candidacy, he asked for the Judge's approval. Judge Celebrezze encouraged him to run. During the campaign, Judge Celebrezze told Wagner that his opponent, defendant Longo, had requested that the Judge pressure Wagner to withdraw. Judge Celebrezze said that he had refused this request. Longo won the election by a narrow margin.

At Judge Celebrezze's request, and with his active support, Wagner then entered the election for Ward Leader of the Democratic Party of Garfield Heights, which was scheduled for May 3, 1994. Mayor Longo supported Wagner's opponent, Rose Lovano.

In December 1993, Frank Celebrezze announced his candidacy for Ohio's Eighth District Court of Appeals. In March 1994, Mayor Longo threatened to prompt a candidate to run against Frank Celebrezze unless the Judge convinced Wagner to withdraw from the Ward Leader race and endorse Lovano. On April 7, 1994, the Judge informed Wagner that he expected him to concede to Longo's ultimatum. Wagner agreed to withdraw from the race but refused to endorse Lovano.

At this point, Wagner could sense a problem was about to arise over his refusal to support Lovano, and so he began to tape record his conversations with the Judge. On Saturday, April 23, 1994, the two had the following conversation:

JUDGE: My brother got a call from Mayor Longo

WAGNER: Okay.

* * * *

JUDGE: Frank, listen to me. Do not put me in the middle. And do not make a liar out of me or my brother. Think about that because I don't intend, whether Longo is a son-of-a-bitch or a nice guy, I do not intend to have somebody say 'his word ain't worth shit.'

WAGNER: Uh huh.

JUDGE: Especially when you're dealing with an individual who has made it his business to screw me because I wouldn't fire you and give his girlfriend a job. You better think about that and we'll talk about it on Monday.

On Monday, April 25, 1994, Judge Celebrezze called Wagner into his office and ordered him to sign a letter to Lovano stating as follows: "Just a brief note to let you know that whatever the outcome of next Tuesday's election, I will do all in my power to see my people and I support you in remaining Ward Leader of Garfield Heights."

Wagner refused. He reiterated that he was willing to withdraw from the race but would not endorse Lovano. The Judge stated that withdrawal was not enough: Wagner must endorse Lovano or lose his job. During a telephone conversation later that evening, Judge Celebrezze again stated that Wagner must sign the letter endorsing Lovano or be fired.

On April 26, 1994, when Wagner again refused to sign the letter endorsing Lovano, Judge Celebrezze terminated his

employment. Wagner recorded their conversation that day, including the following:

> WAGER: I can't believe you're going to fire me over that stupid letter.
>
> JUDGE: You put me in an untenable position, this is how I get out of it. Your job is, like I told you yesterday and I've told you before, your first job is to get me reelected -- not get me canned. It's just that simple. You're running, you're trying to bullshit people -- now please -- I'm not -- I'm not stupid -- you're trying to bullshit me that you ain't gonna run, I know what you're up to . . . .
>
> * * * *
>
> JUDGE: Unless that fucking Rose Lovano gets reelected I got a major headache.

After terminating Wagner, Judge Celebrezze wrote to Judge Flanagan, the Administrative Judge for the Domestic Relations Court, advising him that Wagner had resigned. Wagner then submitted a letter to Judge Flanagan stating that he had been fired for refusing to sign a letter of political support. Judge Flanagan recorded a personnel action terminating Wagner and stating that Wagner had resigned. This suit followed.

II.

We review the District Court's granting of summary judgment *de novo*. *Walbro Corp. v. Amerisure Cos.*, 133 F.3d 961, 966 (6th Cir. 1998). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This case presents no question of fact because the defendants based their motions for summary judgment solely on Wagner's allegations and testimony.

To state a § 1983 claim, Wagner must prove that he was deprived of a right secured by the Constitution or the laws of the United States and that the deprivation was caused by a person while acting under the color of state law. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978). Wagner claims that his termination deprived him of two constitutional rights: his First Amendment right to freedom of speech and political association, and his Fourteenth Amendment right to procedural due process before being discharged from public employment. We disagree.

A. First Amendment Claim

The Supreme Court has held that, generally, public employees may not be terminated on the basis of their political beliefs or for exercising their right of free speech. *See, e.g., Branti v. Finkel*, 445 U.S. 507 (1980); *Perry v. Sindermann*, 408 U.S. 593 (1972). However, the Court has also made clear that not all government employees are entitled to this First Amendment protection. "[I]f an employee's private political beliefs would interfere with his discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti*, 445 U.S. at 517. Accordingly, political patronage employees may be terminated for purely political reasons.

Before *Branti*, the Court's analysis of political patronage

dismissals exclusively turned on whether the government employee held a position that entailed policymaking or required confidentiality. *See Elrod v. Burns*, 427 U.S. 347 (1976). The Court in *Branti* modified the standard: "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office." *Branti*, 445 U.S. at 518.

A government employee thus may be discharged for political reasons upon a showing that the employee's "political affiliation is relevant to the quality of public service." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 89 n.5 (1990). "Political affiliation" is not strictly limited to partisan alliance, but instead "refers to commonality of political purpose and support." *Williams of City of River Rouge*, 909 F.2d 151, 153 n.4 (6th Cir. 1990); *see also McCloud v. Testa*, 97 F.3d 1536, 1547-52 (6th Cir. 1997) (holding that "political affiliation" extends to ideological factions of the same political party).

This Court has consistently upheld patronage decisions based on the employee's alleged failure to provide the political support expected by his or her government employer. *See, e.g., Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909 (6th Cir. 1991) (holding that the new mayor's refusal to rehire the prior mayor's secretary did not violate the First Amendment even where political motivations underlying the dismissal were personal and not partisan); *Rice v. Ohio Dep't of Transp.*, 887 F.2d 716 (6th Cir. 1989) (holding that the department's decision not to promote a Republican employee because of his alleged failure to donate enough money to the Republican Party did not violate the First Amendment).

1. Applicability Of Political Patronage Doctrine

Wagner, however, contends that the legal framework set forth above does not apply here. He urges this Court to view his termination exclusively as a deprivation of his right to speak on a matter of public concern, evaluated under the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).[1] However, our review of the record indicates that Wagner was discharged because his political affiliations ran contrary to the Judge's political interests, and so his dismissal should be analyzed under the political patronage doctrine.

The record does not support Wagner's claim that he was fired simply for exercising his First Amendment right to refuse to speak out on a matter of public concern. Wagner's limited focus on his refusal to sign the letter supporting Lovano for Party Ward Leader misrepresents the record. Judge Celebrezze terminated Wagner because he believed that they no longer enjoyed the requisite commonality of political purpose and support, as ultimately evidenced by Wagner's refusal to sign the letter.

Wagner and Judge Celebrezze had a political relationship long before the specific issue of the letter arose. Wagner sought the Judge's approval and support before running for mayor of Garfield Heights in 1993. When Wagner entered the election for party ward leader the following year, he did so with the Judge's prior approval and encouragement. A rift in their

---

[1]The Court held that when a public employee is discharged as a result of speech relating to matters of public concern, courts are to "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

political agenda developed after Mayor Longo threatened to impede the political aspirations of the Judge and his brother if Wagner remained in the race and refused to support Lovano.

Judge Celebrezze's statements to Wagner demonstrate that Wagner's political affiliation lay at the heart of his discharge. For example, before the letter became an issue, the Judge told Wagner: "Do not put me in the middle. And do not make a liar out of me and my brother . . . . Especially when you're dealing with an individual who has made it his business to screw me because I wouldn't fire you and give his girlfriend a job." (J.A. at 171.) Judge Celebrezze discharged Wagner because Wagner had put the Judge's political future at stake by refusing to endorse Lovano. After the termination, the Judge told Wagner: "You put me in an untenable position, this is how I get out of it. Your job is, like I told you yesterday and I've told you before, *your first job is to get me reelected -- not get me canned.*" (J.A. at 175.)

Wagner was fired because the Judge viewed him as a threat to his reelection. The facts of this case thus lend themselves "to a raw test of political affiliation . . . without the necessity of an inquiry more detailing than asking whether the requirement was appropriate for the employment in question." *O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 719 (1996). As a result, we apply the political patronage line of cases in adjudicating Wagner's claim.

2. <u>Wagner's Status As A Political Patronage Employee</u>

In light of Circuit precedent and the specific facts of this case, we conclude that Wagner's political affiliation had an effect on the efficient functioning of the Judge's chambers. As a result, Judge Celebrezze was entitled to discharge Wagner once he perceived the bailiff as a threat to his political agenda.

This Court has expressly held that a bailiff who serves only one judge is a patronage employee who can be discharged for purely political reasons. *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988) (holding that a judge did not violate First Amendment rights of a bailiff who was discharged because he supported the judge's opponent in a recent election). In *Balogh*, we noted that a bailiff has a confidential relationship with the judge for whom he serves because a bailiff handles sensitive communications for the judge, acts as his bodyguard, and may learn about the outcome of pending cases before the decision is officially announced. *Id.* at 356. We held that because judges must be able to rely on the confidentiality of this relationship, they are permitted to discharge bailiffs with whom they have serious political differences. *Id.* at 356-57. *See also McCloud*, 97 F.3d at 1557 (stating that, generally, "confidential employees who control the lines of communications" to elected officials may be dismissed for purely political reasons).

We agree with the District Court that the political patronage doctrine is particularly applicable here because Wagner had voluntarily enmeshed his politics with those of the Judge. As a result, his political affiliation with Judge Celebrezze had already become a part of his role as bailiff when the dispute arose. Once the Judge perceived that Wagner was acting contrary to his political interests, he was entitled to discharge Wagner. For example, in *Faughender*, this Court held that a mayor could fire his secretary for purely political reasons, explaining that "a mayor's secretary is clearly the type of position that involves access to confidential and political material, and political loyalty, whether partisan or personal, is an essential attribute of the job." *Faughender*, 927 F.2d at 914. We believe that the same holds true here, particularly where Wagner had already intertwined his politics with those of the Judge.

Under these facts and the governing case law in this Circuit, we find that Wagner's political affiliation could reasonably be expected to affect the efficient functioning of Judge Celebrezze's chambers, and so Wagner could be terminated for purely political reasons. Because Wagner, as a political patronage employee, was not entitled to First Amendment protection, his First Amendment claim was properly dismissed.

B. Fourteenth Amendment Claim

Wagner fares no better with his Fourteenth Amendment due process claim. Wagner contends that his dismissal, without notice or an opportunity to be heard, violated his procedural rights under the Due Process Clause. As a threshold matter, Wagner must establish that he had a protected property interest in his continued employment as Judge Celebrezze's bailiff. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). "[A] property interest exists and its boundaries are defined by 'rules and understanding that stem from an independent source such as state law -- rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.'" *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 141 (6th Cir. 1997) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Consequently, to establish a protected interest in his continued employment, Wagner must identify a state statutory or contractual right that was violated by his termination. *Id.*

Wagner can identify no such right and, therefore, he has failed to establish a protected property interest in his continued employment as a bailiff.

1. Statutory Right

First, Ohio statute expressly provides that bailiffs are "unclassified" employees. O.R.C. §124.11(A)(10) (Anderson 1998). Under Ohio law, an unclassified employee is an "at-will" employee subject to discharge for any reason. *Lawrence v. Edwin Shaw Hosp.*, 566 N.E.2d 1256, 1258 (Ohio App. 1988). Unclassified civil servants have no property right to continued employment and serve at the pleasure of the appointing authority. *Christophel v. Kukulinsky*, 61 F.3d 479, 482 (6th Cir. 1995). Wagner's discharge did not infringe any property interest created by statute.

2. Contractual Right

Second, Wagner cannot identify any contractual right that was violated by his termination. Wagner contends that the Domestic Relations Court's Employment Manual (the "Manual") created an implied, or "expectation," interest in not being terminated without due process. Specifically, Wagner points to language in the preamble stating that the Manual presents the rules, policy and procedures that govern county employment, as well as to the Manual's sections on disciplinary policy and procedure. The disciplinary policy provides, in relevant part:

> It is the intent of the Administration that all employees enjoy continuous and uninterrupted employment during their tenure as Domestic Relations Court employees. Most separations of employment are voluntary; however, there are occasions when circumstances warrant disciplinary action [that], at times, results in involuntary removal. It is the policy of the Administration to proceed objectively, fairly and impartially when initiating

> corrective disciplinary action stemming from employee misconduct.

The Manual then briefly outlines a four-step "Disciplinary Procedure," without further detail: (i) verbal consultation; (ii) written reprimand, (iii) time suspension, and (iv) final termination.

We look to state law in determining whether an employment handbook constitutes an implied contract that creates a reasonable expectation of continued employment or due process before termination. *Gregory v. Hunt*, 24 F.3d 781, 785 (6th Cir. 1994). Consistent with the presumption of at-will employment, "the party asserting an implied contract of employment has a heavy burden. He must prove the existence of each element necessary to the formation of a contract." *Penwell v. Amherst Hosp.*, 616 N.E.2d 254, 258 (Ohio 1992). Significantly, an employee must show a "meeting of the minds" of the parties that the employment was other than at-will. *Schwartz v. Comcorp, Inc.*, 633 N.E.2d 551, 556 (Ohio 1993). Without mutual assent, a handbook is merely a unilateral statement of rules and policies that creates no rights and obligations. *Tohline v. Central Trust Co., N.A.*, 549 N.E.2d 1223, 1227 (Ohio App. 1988).

Such is the case here. The Manual does not alter Wagner's status as an at-will employee who can be discharged without procedural protections. The Manual expressly provides that some employees may be dismissed involuntarily and imposes no requirements for notice or a hearing before termination. The Manual's ambiguous language concerning objectivity and fairness in discharge decisions is not sufficient to give rise to any contractual obligation. *See, e.g., Schwartz*, 633 N.E.2d at 553. Similarly, the Manual's four-step "Disciplinary Procedure" in no way obligates the Domestic

Relations Court to take any particular action before terminating an employee. *Gargasz v. Nordson Corp.*, 587 N.E.2d 475, 477-78 (Ohio App. 1991) (holding that an employee handbook's list of disciplinary procedure set forth only possible penalties for violating company policies and did not require the employer to follow each step in every instance).

Finally, Wagner has presented no evidence of any "meeting of the minds" that would transform the employee handbook into an implied contract. For example, Wagner was not required to sign any statement that he agreed to follow the rules set forth therein, and the Domestic Relations Court expressly retained the right unilaterally to amend the Manual. *See, e.g., Clipson v. Schlessman*, 624 N.E.2d 220, 223 (Ohio App. 1993) (holding that an employee manual was not a contract where the employer retained the unilateral right to modify the handbook); *Brandenburger v. Hilti, Inc.* 556 N.E.2d 212, 217 (Ohio App. 1989) (holding that an employee handbook was not a contract where the employee was not required to sign an attestation clause agreeing to its terms).

Accordingly, we hold that Wagner lacked any protected property interest in his continued employment as Judge Celebrezze's bailiff and so the District Court properly dismissed his Fourteenth Amendment claim.

III.

Because Wagner has failed to establish that he was deprived any constitutional rights, the District Court properly dismissed his §§ 1983 and 1988 claims as to all defendants. In addition, because we hold that no constitutional violation occurred, we need not address the issue of whether Judge Celebrezze enjoyed qualified immunity from suit. *Salehour v. University of Tennessee*, --- F.3d ---, 1998 WL 735837 (6th Cir.

Aug. 27, 1998) (stating that qualified immunity analysis is appropriate only where it is first found that a constitutional violation had occurred). Finally, given the absence of any viable federal claims, the District Court properly dismissed Wagner's state claims pursuant to 28 U.S.C. § 1367(c)(3). For the foregoing reasons, we AFFIRM the grant of summary judgment in favor of all defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK WAGNER,	)	Case No. 1:94 CV 2078
	)	
Plaintiff	)	JUDGE SOLOMON
	)	OLIVER, JR.
v.	)	
	)	
JAMES P. CELEBREZZE, et al.,	)	JUDGMENT ENTRY
	)	
Defendants	)	(Filed June 26, 1997)

The court, having granted summary judgment to all Defendants in the within case, now enters judgment for the Defendants and against the Plaintiff on the Plaintiff's federal claims and dismisses Plaintiff's state law claims without prejudice.

IT IS SO ORDERED.

/s/ Solomon Oliver, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK WAGNER,	)	Case No. 1:94 CV 2078
	)	
Plaintiff	)	JUDGE SOLOMON
	)	OLIVER, JR.
v.	)	
	)	
JAMES P. CELEBREZZE, et al.,	)	ORDER
	)	
Defendants	)	(Filed June 26, 1997)

I. BACKGROUND

Plaintiff Frank Wagner brought this suit based on the termination of his employment by Judge James P. Celebrezze of the Court of Common Pleas for Cuyahoga County, Ohio, Division of Domestic Relations [hereinafter, "Judge Celebrezze"], to whom he was solely assigned as a bailiff. He claims various defendants violated his free speech and due process rights under both the federal and Ohio constitutions as well as Ohio common law. The Plaintiff's complaint makes the following claims: (1) that Judge Celebrezze, the Court of Common Pleas for Cuyahoga County, Ohio, Division of Domestic Relations, and Cuyahoga County, Ohio violated the federal and Ohio constitutions by discharging him for exercising his speech rights; (2) that Judge Celebrezze, Thomas Longo and Frank Celebrezze conspired to violate his free speech rights; (3) that Judge Celebrezze caused the Court of Common Pleas for Cuyahoga County, Ohio, Division of Domestic Relations and Cuyahoga County, Ohio to terminate his employment in violation of his federal and Ohio constitutional rights to due process; (4) that Judge Celebrezze's

violated Plaintiff's due process rights in furtherance of his conspiracy with Thomas Longo and Frank Celebrezze; and (5) that Judge Celebrezze, Thomas Longo and Frank Celebrezze tortiously interfered with Plaintiff's employment contract with the Court of Common Pleas for Cuyahoga County, Ohio, Division of Domestic Relations and Cuyahoga County, Ohio.

Judge Celebrezze filed a motion for summary judgment listing the following questions for the court: (1) whether his termination of the Plaintiff violated Wagner's free speech rights; (2) whether the Plaintiff was entitled to pre-termination due process procedures; (3) whether he is qualifiedly immune from the suit on those claims; and (4) whether the court should retain supplemental jurisdiction over the Plaintiff's tortious interference claim.

On October 11, 1996, the court issued a Memorandum of Opinion and Order granting Judge Celebrezze's summary judgment motion. That Order made four holdings: First, that Judge Celebrezze did not violate the Plaintiff's right to free speech, and was, therefore, qualifiedly immune from suit on Plaintiff's free speech claims. (Doc. No. 47 at 10.) Second, that the Plaintiff was not entitled to pre-termination due process procedures, and, therefore, that Judge Celebrezze was qualifiedly immune from suit on the Plaintiff's due process claims. (*Id.* at 14.) The court further concluded that even if Judge Celebrezze did violate Wagner's free speech or due process rights, he was qualifiedly immune from the Plaintiff's suit since those rights were not clearly established at that time. Third, that for the purposes of the Plaintiff's 42 U.S.C. § 1985(3) conspiracy claim, Judge Celebrezze was entitled to judgment as a matter as a matter of law since Wagner could not establish Judge Celebrezze's actions actually violated his free speech or due process rights. (*Id.* at 10 n.5.) Fourth, that the court would decline jurisdiction over the Plaintiff's

supplemental state claims against Judge Celebrezze and dismiss those claims without prejudice. (*Id.* at 15.)

II. MOTION OF REMAINING DEFENDANTS FOR SUMMARY JUDGMENT

The remaining parties have agreed by stipulation that they wish to have all claims to which they are parties resolved based on the submissions before the court when it decided Judge Celebrezze's motion. (Doc. No. 57.)

The parties' stipulation is essentially a motion for the court to rule on the liability of the remaining Defendants without further discovery or briefing. (*Id.* ¶¶7, 8, 10.) The court hereby concludes that it is in the interest of judicial economy to do so.

Now having considered the previous submissions to the extent they are pertinent to the claims between the remaining parties, the court hereby concludes, consistent with its prior Order granting James Celebrezze's summary judgment motion, that it should grant each of the remaining Defendants summary judgment.

In its October 11, 1996 Memorandum of Opinion and Order, the court held, based on the respective submissions of the parties, that the Plaintiff was not terminated in violation of his free speech rights and that he was not entitled to pre-termination due process procedures that would support a due process claim. For the reasons stated therein, the court now holds that as a matter of law, none of the remaining Defendants violated the Plaintiff's free speech or due process rights. The court further holds the Plaintiff's conspiracy claim against the remaining Defendants fails as a matter of law for lack of any underlying violation of the law. *See, Collyer v. Darling*, 98 F.3d 211, 229, 233 (6th Cir.) (noting that proof of a

civil conspiracy requires a showing that the defendants' plan was illegal and that proof of a private conspiracy must be based on an underlying deprivation of the plaintiff's rights), *cert. denied*, ___ U.S. ___, 1997 WL 181408 (June 9, 1997). As the court's holdings leave the Plaintiff without a federal claim against the remaining Defendants, the court declines to exercise jurisdiction over Wagner's state claim pursuant to 28 U.S.C. § 1367(c)(3).

Per the parties' request, the court conditions its present Order as follows:

> [i]f the United States Court of Appeals for the Sixth Circuit fails to affirm the decision of the United States District Court as to defendants Frank Celebrezze and/or Thomas Longo, then all parties may, upon remand to the United States District Court, engage in discovery and may also file motions for Summary Judgment as a result thereof.

(Doc. No. 57, ¶9.)

IT IS SO ORDERED.

/s/ Solomon Oliver, Jr.
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK WAGNER,	)	Case No. 1:94 CV 2078
	)	
Plaintiff	)	JUDGE SOLOMON
	)	OLIVER, JR.
v.	)	
	)	MEMORANDUM OF
JAMES P. CELEBREZZE, et al.,	)	OPINION AND ORDER
	)	
Defendants	)	(Filed October 11, 1996)

The Plaintiff, Frank Wagner, sues, *inter alia*, Judge James P. Celebrezze, alleging he fired him from his position as bailiff for refusing to abandon his own political campaign and instead support the judge's political objectives. Wagner claims Judge Celebrezze thereby violated his free speech and due process rights under 42 U.S.C. §§ 1983 and 1985 as well as rights granted to him under Ohio law. Judge Celebrezze now moves the court for summary judgment on the grounds of qualified immunity and requests dismissal of Wagner's Ohio claims for lack of supplemental jurisdiction. The court grants Judge Celebrezze's motion for the reasons that follow.

I. FACTS AND PROCEDURAL HISTORY

The Plaintiff filed his complaint against the following parties: Judge Celebrezze, individually and in his capacity as judge of the Cuyahoga County Domestic Relations Court; Thomas Longo, Mayor of Garfield Heights, Ohio; Frank D. Celebrezze, the Judge's brother; the Domestic Relations Court; and Cuyahoga County. The Plaintiff asserts his damages claims against Defendants James Celebrezze; Thomas Longo,

and Frank Celebrezze.

The following facts are not in dispute.[1] The Plaintiff was employed as a bailiff in the Domestic Relations Court from December 3, 1990, until April 26, 1994. For all but the first month of this period he served solely as bailiff to Judge Celebrezze. Wagner's duties included running errands, handling phone calls and otherwise screening people wishing to contact Judge Celebrezze, scheduling hearings, scheduling attorney conferences, administering the judge's docket, opening and closing court, and swearing in witnesses. He did not assist Jude Celebrezze in making legal decisions, attend attorney conferences, or assist in formulating the policies of either the Domestic Relations Court or Judge Celebrezze's chambers.

When he was hired by Judge Celebrezze, Plaintiff was a member of the Garfield Heights Board of Education. In January of 1993, Plaintiff was considering running for Mayor of Garfield Heights and before announcing his candidacy he met with the judge to seek his approval. Judge Celebrezze approved of Plaintiff's candidacy and encouraged him to run. The judge's brother, Frank Celebrezze, contributed to Plaintiff's campaign. During the campaign Judge Celebrezze informed Plaintiff that his opponent, Defendant Longo, had requested that the judge pressure Plaintiff to withdraw from the Mayoral race. Judge Celebrezze told Wagner he had refused this request. The Plaintiff lost the election to Longo by a narrow margin.

At the behest, and with the active support of Judge Celebrezze, Plaintiff then entered the election for Ward Leader

---

[1]For the purposes of this motion, Defendant accepts Plaintiff's statement of the facts. (Def. James Celebrezze's Summ. J. Mot. ("Def.'s Mot.") at 1-2.)

of the Democratic Party of Garfield Heights, which was scheduled for May 3, 1994. Mayor Longo was supporting his opponent, Rose Lovano.

In December 1993, Judge Celebrezze's brother, Frank Celebrezze, announced his candidacy for Ohio's 8th District Court of Appeals. Mayor Longo then threatened to prompt a candidate to run against Frank Celebrezze in the 8th District election unless Judge Celebrezze convinced Plaintiff to withdraw from the Ward Leader race and endorse Lovano. The judge informed Plaintiff he expected him to concede to Longo's ultimatum. Wagner agreed to withdraw from the race but not to endorse Lovano. On April 25, 1994, Judge Celebrezze called Wagner into his office and ordered him to sign a letter to Lovano stating as follows: "Just a brief note to let you know that whatever the outcome of next Tuesday's election, I will do all in my power to see my people and I support you in remaining Ward Leader of Garfield Heights."

When Defendant presented Plaintiff with this letter Wagner reiterated that he was willing to withdraw from the race but refused to endorse Lovano. Judge Celebrezze stated that withdrawal would not be sufficient, that Wagner must endorse Lovano or lose his job. On April 26, when Plaintiff again refused to sign the letter, Judge Celebrezze terminated his employment.

After terminating Wagner, Judge Celebrezze wrote to Judge Flanagan, the Administrative Judge for the Domestic Relations Court, advising him that Plaintiff had resigned. The Plaintiff submitted a letter to Judge Flanagan informing him he had been fired for refusing to sign a letter of political support. Judge Flanagan recorded a personnel action terminating the Plaintiff and stating that Wagner had resigned. Based on these facts, Plaintiff maintains his termination was in violation of his

First Amendment rights, as applied to the states through the Fourteenth Amendment.

The Plaintiff also contends his termination was in contravention of the terms of the Domestic Relations Court's employment manual. In support of this position he points to the "Discipline Policy," which states, *inter alia*, "[i]t is the policy of the Administration to proceed objectively, fairly and impartially when initiating corrective disciplinary action." (Policy and Procedure Manual at 16.) Wagner also agues his immediate termination violated the "Disciplinary Procedure" section of the employment manual, which lists the following potential punishments for employees: "1. verbal consultation; 2. written reprimand; 3. time suspension; 4. final termination." (*Id.* at 16-17.) He therefore asserts his termination was in violation of the Fourteenth Amendment's due process clause.

Judge Celebrezze bases this motion on his asserted qualified immunity to Plaintiff's federal claims.

II. STANDARD FOR GRANT OF SUMMARY JUDGMENT

Summary judgment is appropriate if:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). A fact is material if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984)

The court considers the evidence in "the light most favorable to the party opposing the motion." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970) (citation omitted). Nonetheless, "[t]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Therefore, the court should rule "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. LAW AND ANALYSIS

A. The Structure of Qualified Immunity Analysis

As this motion addresses only Wagner's claims against Judge Celebrezze, the court begins its analysis with consideration of the affirmative defense of qualified immunity. Public officers may assert qualified immunity as an affirmative defense to § 1983 suits based on actions taken within the scope of their duties. The Defendant may assert qualified immunity as a defense to this suit because making employment decisions is an administrative function of his job. *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993) (citation omitted) (according qualified immunity to a judge who decided not to rehire an employee).

In order to overcome this defense, Plaintiff must establish that:

(1) the Defendant violated his Constitutional rights; and
(2) this violation was "clearly established under statutory or constitutional rights of which a reasonable person would have known" at the time Defendant acted.

Siegert v. Gilley, 500 U.S. 226, 232 (1991) (declaring that establishing a constitutional violation is a "necessary concomitant" to overcome qualified immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Application of this test is a question of law to be resolved before trial. *Guercio v. Brody*, 911 F.2d 1179, 1183 (6th Cir.), *cert. denied* 500 U.S. 904 (1990). The Defendant bears the initial burden of showing that he was acting within the scope of his duties. *Id.* That issue is not contested here. The ultimate burden of proof, however, is on the Plaintiff to show that Judge Celebrezze is not entitled to qualified immunity. *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

In order to deny qualified immunity, this court must find both that Defendant's termination of Plaintiff actually violated a Constitutional rule and also that Defendant should have known his actions would violate the law on these facts. *E.g., Guercio*, 911 F.2d at 1184. In determining which rules are "clearly established" the court considers only the objective reasonableness of Defendant's specific actions. Thus, "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992).

Qualified immunity analysis proceeds in two stages: first, consideration of whether Defendant violated a Constitutional right; second, consideration of whether that right was clearly established at the time of Defendant's actions. *Blair v. Meade*, 76 F.3d 97, 100 (6th Cir. 1996). The court finds it should grant summary judgment to Defendant on qualified immunity grounds in regard to both Plaintiff's First Amendment and due process claims. First, because Wagner has not shown a violation of either of these rights. Second, because even if his rights were violated, they were not clearly established at the time Defendant acted.

B. First Amendment Claim

The Plaintiff claims he was fired for exercising his right to engage in protected speech. Wagner satisfies the requirement that his speech involved a matter of public concern since speech about political elections is at the core of the First Amendment. *Rankin v. McPherson*, 483 U.S. 378 (1987). The question, then, is whether the hiring authority can show that political affiliation is an appropriate job requirement[2]. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). This rule balances the values of individual liberty and the efficient operation of government. Hence, "if an individual's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the state's vital interest in maintaining governmental effectiveness and efficiency." *Id.* at 517.

The Sixth Circuit holds that political affiliation may be an appropriate job requirement even when, as here, the employer and employee are members of the same party. *See, Faughender v. City of North Olmsted*, 927 F.2d 909, 914 n.2 (6th Cir. 1992) (granting summary judgment in favor of a new mayor who did not rehire a personal secretary who was closely associated with the old mayor). Whether political patronage may be a basis for a termination depends on a case by case analysis since "job classifications and personalities vary in each case." *Id.* at 419.

The special nature of a judge's relationship with his bailiff

---

[2] A prior public employee speech case, *Elrod v. Burns*, 427 U.S. 347, 367-372 (1976), stated "policy making" and "confidential" employees are not protected from politically motivated discharge. The *Branti* decision explains this test as involving the question of whether political fealty was an appropriate requirement for the plaintiff's position. 445 U.S. at 518.

sometimes allows him to fire his bailiff for engaging in otherwise protected speech. In *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988), the Sixth Circuit upheld the district court's granting of summary judgment to a judge who fired a bailiff assigned solely to his chambers despite the plaintiff's assertion that the firing was based on political differences[3]. The court found that "[j]udicial aides who work in chambers and are assigned to one judge as court officer, bodyguard and general assistant normally handle sensitive information about cases of a confidential nature, information which is not public information." *Id.* In reaching its conclusion, the Sixth Circuit specifically adopted the reasons articulated by the district court. *Id.* at 357. The district court in turn made a finding that "[b]ecause the court officer in the 26th District is in close contact with the judge and has access to confidential communications and records affecting decisions, the court officer is a confidential employee." *Balogh v. Charron*, 666 F.Supp. 987, 988 (E.D. Mich. 1987) (citing *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985)).

The facts of this case are similar to those presented in *Bologh* in that Plaintiff was assigned exclusively to Defendant and worked in his chambers. The Plaintiff also served as a general assistant to the Defendant, having run miscellaneous errands for Judge Celebrezze. The Plaintiff had to interact with the judge in order to manage the docket, schedule conferences, and relay phone messages. As in *Balogh*, the

---

[3] The issue of whether a judge may terminate his bailiff for exercising his speech rights was first addressed by the Seventh Circuit. In *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985), a newly elected judge fired bailiffs who had supported his opponent in the preceding election. The court determined that certain employees work is such close proximity with a public official that "animosity arising from political opposition can create an untenable job situation." *Id.* at 421-422. According to the *Meeks* court, "[t]he paradigm example of this type of environment is the chambers of a judge." *Id.* at 423.

Plaintiff handled sensitive information that would normally be shielded from the public. Finally, Plaintiff screened Defendant from the public and arranged for attorneys to meet with the judge. In performing his task, the Plaintiff could follow the progress of claims and could learn of case determinations in advance of notification to the parties.

The Plaintiff counters these facts by asserting that he performed only ministerial functions. Wagner states that he had neither prior knowledge of rulings nor input into any policies set by the Defendant.

These assertions are immaterial. The focus of the determination of the validity of requiring political affiliation is on the "'inherent powers' of the office, not what the individual actually does." *Faughender*, 927 F.2d at 913 (citation omitted); *Meeks*, 779 F.2d at 419 & n.1. The Plaintiff's duties allowed him access to confidential information about cases. This access is more important than whether Plaintiff actually took note of sensitive information.

Further, this is not a case where the employee had previously kept his political involvements separate from his performance of his job duties and his employer then imposes an additional requirement of political loyalty. The Plaintiff admits he voluntarily enmeshed his politics with those of Defendant. The Plaintiff sought Judge Celebrezze's approval before announcing his candidacy for Mayor of Garfield Heights. The Plaintiff then entered the election for Ward Leader of the Democratic Party of Garfield Heights at the behest, and with the active support of the judge. Judge Celebrezze's request that Wagner sign the letter endorsing Lovano was made in the context of this ongoing political interaction between the

parties[4].

Judge Celebrezze could not be expected to retain a bailiff with whom he had serious political differences. A bailiff assigned to a particular judge "cannot perform his job by the simple exercise of ministerial competence." *Newcomb v. Brennan*, 558 F2d 825, 830 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (denying relief to a deputy city attorney who was terminated for running for Congress against his employer's wishes). The nature of the position required close personal contact and granted Wagner access to confidential information. Since Judge Celebrezze was required to work closely with and trust his bailiff, tensions between the parties could reasonably be expected to affect his efficient performance of his public duties. Hence, it was not necessary for him to await actual disruptions within his chambers before terminating Wagner. *Connick v. Myers*, 461 U.S. 138, 151-152 (1983). On these facts, political loyalty was an appropriate requirement for Plaintiff's position as a matter of law.

Even if Plaintiff's established a First Amendment violation, Defendant would be qualifiedly immune from suit. The court cannot find Judge Celebrezze violated any "clearly established" First Amendment rights held by Plaintiff since at the time he terminated Wagner a reasonable judge could have concluded his actions would violate no clearly established rule: *E.g.*, *Harlow*, 457 U.S. at 818. In *Mumford*, 4 F.3d at 433-435, the

---

[4] The fact that Plaintiff had allowed his political involvements to become a part of his relationship with Defendant answers any concerns about the differences between this case and *Balogh*. While, unlike in *Balogh*, Wagner had never supported another candidate for Judge Celebrezze's position and was asked to affirmatively support a third party, the nature of his relationship with the judge was such that this request was not unforeseeable. More so than in *Balogh*, Wagner's political affiliation with Judge Celebrezze had already become a part of his role as bailiff.

Sixth Circuit granted qualified immunity to a judge who allegedly refused to rehire a chief referee for politically motivated reasons. In granting qualified immunity the *Mumford* court stated it was "mindful of its decision in *Balogh* . . . which disposition supports Judge Zieba's position that he should be accorded qualified immunity." *Id.* at 435. The facts in this case are closer to those in *Balogh*, which also involved a bailiff, than were the facts in the *Mumford* decision. Consequently, the court grants Defendant summary judgment on the basis of qualified immunity and dismissed Plaintiff's First Amendment claim[5].

The court cautions, however, that its holding is limited to the circumstances of this case. The court's opinion should not be read to imply that a bailiff's Constitutional rights would not be violated if a judge sought to force him to support a candidate when the bailiff was not otherwise politically affiliated with his judge. In this case, Wagner had already so intertwined his politics with those of Judge Celebrezze that political loyalty became an appropriate part of his job requirements.

C. Due Process Claim

A plaintiff claiming he was terminated in violation of his due process rights must prove two elements: 1) that he has a protected property interest in his employment, and 2) that he was denied sufficient pretermination procedures. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). The Sixth Circuit has declared that "as an initial matter, we

---

[5] While qualified immunity would not preclude injunctive relief under 42 U.S.C. § 1985(3), the court holds Defendant is entitled to judgment as a matter of law on this claim because Wagner cannot establish Judge Celebrezze's actions violated his Constitutional rights.

must determine whether [Plaintiff] had a protected property interest" in his employment. *Williams v. Com. Of KY*, 24 F.3d. 1526, 1537 (6th Cir.), *cert. denied sub nom. Allen v. Williams*, ___ U.S. ___, 115 S.Ct. 358 (1994). The court does not reach the second prong of the due process test because Wagner cannot establish that he had a protected interest in his position as bailiff.

The Supreme Court has stated that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law . . . .'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The Plaintiff may establish that Ohio law granted him a protected property interest in his employment based on either of two grounds: 1) by showing that he had a statutorily created interest in not being discharged without a showing of good cause or 2) by showing that he had an implied, or "expectation," interest in not being terminated without due process based on statements in his employment manual that created a "mutually explicit understanding" between himself and the Domestic Relations Court. *Williams*, 24 F.3d at 1537-1538 (citation omitted); *Newsom v. Norris*, 888 F.2d 371, 374 (6th Cir. 1989).

The Plaintiff does not have a statutorily created interest in his position as bailiff. In *Williams*, Kentucky law deemed the plaintiff to be a "classified" employee. The relevant state statute prevented the termination of classified employees without a showing of cause. *Williams*, 24 F.3d at 1538 (citation omitted). Accordingly, the court held the plaintiff had a protected property interest in her employment. (*Id.*) In contrast, Ohio law states that bailiffs are "unclassified" employees. O.R.C. § 124.11(A)(10). As Judge Dowd of this

court has noted, "[a]n individual who is in the unclassified civil service . . . does not possess a property interest in continued employment." *Deryck v. Akron City School Dist.*, 633 F.Supp. 1180, 1182 (N.D. Ohio 1986), *aff'd* 820 F.2d 405 (6th Cir. 1987) (interpreting Ohio law) (granting summary judgment against an unclassified contract van driver). Instead, unclassified employees serve at the pleasure of their employers and may be fired for any reason absent discrimination or malfeasance. *Eudela v. Ohio Dept. Of Mental Health & Mental Retardation*, 506 N.E.2d 947, 950 (Ohio Ct. App. 1986) (upholding the termination of a psychiatrist appointed to an unclassified position). Ohio law thus defeats Plaintiff's claim of a statutory property interest in his employment.

Wagner lacks an implied property interest in his employment because neither the "Discipline Policy" nor the "Disciplinary Procedure" in his employment manual created the requisite mutually explicit understanding that he was entitled to particular pretermination procedures. For due process purposes, some regulations may merely enunciate potential penalties, while others may constitute a contract not to terminate the employee without particular procedures. The Court distinguishes between regulations that merely articulate "a careful procedural structure" from those containing "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed . . . and that [an event] will not occur absent specified substantive predicates . . . ." *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1983). Procedures are mandatory only when employment regulations "requir[e] that a particular result is to be reached upon a finding that the substantive predicates are met." *Kentucky Dept. of Corrections*, 490 U.S. at 464 (footnote omitted).

The statements in Plaintiff's employment manual did not create the requisite mandate of particular procedures. Wagner

cites a portion of the Domestic Relations Court's "Discipline Policy" as support for his argument:

> Most separations of employment are voluntary; however, there are occasions when circumstances warrant disciplinary action which, at times, results in involuntary removal. It is the policy of the administration to proceed objectively, fair and impartially when initiating corrective disciplinary action stemming from employee misconduct.

(Policy and Procedure Manual at 16.) The first sentence declares the Domestic Relations Court's right to discharge its employees. The second sentence merely states that the Domestic Relations Court aspires to fairness in its disciplinary actions. In *Kentucky Dept. of Corrections*, 490 U.S. at 464, the Court concluded that prison regulations did not create a liberty interest in receiving visitors because they did not contain the requisite mandatory language. The regulations stated that "it is the policy . . . to respect the right of prisoners to have visitors." *Id.* (citation omitted). The court flatly declared "[t]his language is not mandatory." *Id.* Similarly, the Discipline Policy section of the manual did not grant Plaintiff a protected property interest in his employment.

The Plaintiff also contends the "Disciplinary Procedure" section of the Policy and Procedure Manual establishes a mandatory process he should have been granted before his discharge. The rules list four potential disciplinary actions: 1. verbal consultation; 2. written reprimand; 3. time suspension; and 4. final termination. (Policy and Procedure Manual at 17.) Such publication of possible penalties does not, by itself, create a mandatory sequence of disciplinary procedures when, as here, the employer also retains implicit discretion to determine punishments. *E.g., Gargasz v. Nordson Corp.*, 587 N.E.2d 475, 477 (Ohio Ct. App. 1991) (dismissing a wrongful discharge

action where the terms of the employment manual were insufficiently mandatory to create an implied in fact contract to follow certain procedures). Even the rank ordering of the disciplinary procedures does not create a property interest since no portion of the manual states that termination may not occur absent a prior suspension. Rather, the Disciplinary Procedure stands alone and evinces no intention to modify the discretionary language of the Disciplinary Policy section of the manual.

The Plaintiff has neither a statutory nor an implied basis for claiming a property interest in his employment. He thus fails to establish a Constitutional violation because he lacks a property interest in his employment. The court finds that upon reviewing the applicable case law, Judge Celebrezze could reasonably have concluded his termination of Wagner would violate no clearly established due process right. Thus, the court grants Defendant qualified immunity on this issue and dismisses Plaintiff's federal due process claim against Judge Celebrezze.

IV. DISPOSITION

The court grants Defendant's motion for summary judgment as to Plaintiff's federal speech and due process claims. There being no additional federal claims against this Defendant, the court dismisses Plaintiff's state claims against Defendant James Celebrezze pursuant to 28 U.S.C. 1367(c)(3).

IT IS SO ORDERED.

/s/ Solomon Oliver, Jr.
UNITED STATES DISTRICT COURT

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in

any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United states, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
MAR 22 1999
CLERK

No. 98-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK WAGNER,

Petitioner,

v.

JAMES P. CELEBREZZE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THOMAS J. LONGO

JOHN T. MCLANDRICH
Counsel of Record
TODD M. RASKIN
MAZANEC, RASKIN & RYDER CO., L.P.A.
Attorneys for Respondent Thomas J. Longo
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906

151989

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court and Court of Appeals properly considered Plaintiff's discharge under the political patronage line of cases represented by *Branti v. Finkel*, 445 U.S. 507 (1980).

2. Whether the District Court and Court of Appeals properly held that Plaintiff's discharge did not violate his First Amendment rights.

LIST OF PARTIES

The Petitioner in this case is Frank Wagner.

The Respondents in this case are James P. Celebrezze, individually and in his official capacity as Judge of the Court of Common Pleas, Division of Domestic Relations; Thomas J. Longo, individually; Frank D. Celebrezze, individually, Court of Common Pleas for Cuyahoga County, Ohio, Division of Domestic Relations; and the County of Cuyahoga.

ARGUMENT AND REASONS FOR DENYING THE WRIT

Defendant/Respondent Thomas J. Longo asserts that this case does not present any important or unsettled question of constitutional law under the First Amendment. Rather, Defendant Longo asserts this matter presents an appropriate application by the District Court and Court of Appeals of the existing First Amendment law embodied in this Honorable Court's cases, including *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976). The "patronage line" of cases was the appropriate framework to analyze this case. Defendant Longo asserts the patronage cases are a subset of the "balancing test" line of cases exemplified by *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Connick v. Myers*, 461 U.S. 138 (1983). In patronage cases, the Court has recognized the weight of political affiliation in the balancing process.

Plaintiff/Petitioner incorrectly argues that Plaintiff Wagner's refusal to align his political support with that of Judge Celebrezze, for whom he was bailiff, has no relationship to the efficient operation or effective functioning of the court or the judge's office. However, both the District Court and the Court of Appeals recognized the intermeshed nature of the politics of Judge Celebrezze and Mr. Wagner and the political nature of the bailiff's job which Mr. Wagner held.

Plaintiff and the Defendants (other than the county and court) are all involved in local democratic politics. As recognized by the District Court and Court of Appeals, Mr. Wagner had voluntarily intermeshed his politics with those of Judge Celebrezze by both seeking and receiving Judge Celebrezze's support to run for mayor of Garfield Heights and subsequently for Democratic Ward Leader. Plaintiff apparently argues that political affiliation could not be at issue since Judge Celebrezze,

Mr. Wagner, Frank D. Celebrezze and Thomas J. Longo are all Democrats. However, political affiliation is not so narrowly limited as to be synonymous with party affiliation. Legitimate political affiliation issues extend not only to nominal party affiliation but also to specific political camps or factions within a political party, especially in areas such as Cuyahoga County where one party completely dominates local politics.

Both the District Court and Court of Appeals recognized that part of the bailiff's job is political in nature and that Mr. Wagner's conduct in eroding the judge's political base and thereby reducing his prospects for reelection were legitimate issues of political affiliation sufficient to sustain Mr. Wagner's discharge predicated upon his refusal to support the opposition ward leader candidate.

Defendant Longo asserts that the political patronage line of cases beginning with *Elrod*, *supra*, and its progeny are not a distinct constitutional theory or test, but rather represents a specific circumstance balancing the state's interest in an efficient workforce against the employee's First Amendment rights. Defendant asserts that in political patronage cases the courts have held, as a matter of law, that the political patronage criteria is an appropriate consideration or appropriate requirement for maintaining an efficient workforce which outweighs the employee's own First Amendment right in his political speech.

In *Elrod*, *supra*, this Honorable Court held, in a plurality opinion, that political alliance or allegiance, as a basis upon which to retain or terminate governmental employees was limited to "confidential" employees in "policymaking" positions. *Elrod*, *supra*, at 372. The Court in *Elrod* sought to balance the government's interests with that of the employee.

This Honorable Court in *Branti*, *supra*, affirmed and clarified *Elrod* holding that politically motivated dismissal were

only proper with respect to politically sensitive positions. The Court required the hiring authority to demonstrate that the party affiliation is an "appropriate" requirement for the effective performance of the office involved. *Branti*, *supra*, at 517.

The Sixth Circuit has determined that the position of bailiff for an individual judge is a position for which party affiliation is an appropriate requirement for effective performance of the office involved. *Balogh v. Charron*, 855 F.2d 356 (1988). The circuit found that determining the question of whether a specific position is subject to a political affiliation requirement is an objective test as opposed to being determined by the tasks which any particular employee performs within that job title. *Balogh*, *supra*, at 356-357.

Judge Celebrezze took the position with Mr. Wagner that part of Mr. Wagner's job was to preserve the judge's political support and in essence to get him reelected and not to create political opposition for him. The importance of this political affiliation is particularly significant in the context of the close and confidential working relationship between a judge and his bailiff. Certainly, a judge cannot be expected to retain as a confidential bailiff an individual with whom he has significant political differences which are leading to either an erosion of political support or the creation of political opposition. This is particularly true where the Plaintiff Wagner and Judge Celebrezze have a history of intertwining political issues into their employment relationship.

With respect to this Respondent, Thomas J. Longo, Petitioner's Complaint against Thomas Longo is predicated upon a theory of conspiracy to deprive Plaintiff of his constitutional rights. Plaintiff's conclusory allegations of conspiracy are insufficient. While neither the District Court nor Court of Appeals reached the issue of whether Plaintiff had put forth the evidence necessary to sustain the allegation of a conspiracy,

Defendant asserts there is no evidence in the record to support any such allegation. While Plaintiff's argument attempts to infer that Thomas Longo conspired to have Mr. Wagner terminated if he would not support opposition candidate Rose Lovano there is absolutely no evidence in the record, including the tape-recorded conversations, to support such an allegation. There is no evidence that Longo took any action in furtherance of the alleged conspiracy.

Rather, Plaintiff alleges that Thomas Longo used his political influence by telling Judge Celebrezze that if Judge Celebrezze wished Thomas Longo to throw his political support in favor of the candidacy of Frank D. Celebrezze, that James Celebrezze would have to obtain Mr. Wagner's political support for Thomas Longo's candidate of choice for ward leader, Rose Lovano. Certainly, this exercise of Thomas Longo's independent First Amendment constitutional rights is not conspiratorial conduct which can support liability as to Thomas Longo. Thomas Longo's decision or intimation to support candidates who use their own political influence in support of candidates of Thomas J. Longo's choosing is likewise not a violation of Plaintiff's constitutional rights. *See Pickering*, *supra*.

Judge Celebrezze did not violate Plaintiff's constitutional rights by terminating him for his political affiliation in support of a candidate opposed by Judge Celebrezze. Judge Celebrezze sought to obtain political support by throwing his endorsement and that of his bailiff behind the candidate proposed by Thomas J. Longo. This political difference of opinion between Judge Celebrezze and Petitioner Wagner was a difference of political affiliation sufficient to support Plaintiff's discharge under the *Branti*, *supra*, line of cases.

Equally importantly, Thomas J. Longo did not violate Plaintiff's constitutional rights by engaging in his own First Amendment protected political activity. There is absolutely no

evidence or information that Thomas Longo attempted to convince, coerce or even suggest that Judge Celebrezze terminate Mr. Wagner should he refuse to endorse the Longo backed candidate. Rather, Thomas Longo engaged in perfectly appropriate political activity by indicating he would only support Judge Celebrezze's candidate if Judge Celebrezze and his bailiff supported the opposition candidate for ward leader. Certainly, there is no constitutional violation by Thomas J. Longo for this type of political accommodation.

CONCLUSION

Based on the foregoing, Defendant Thomas J. Longo asserts he has not violated Plaintiff's constitutional rights by the statement attributed to him, that he would support a candidate in opposition to Frank D. Celebrezze unless James Celebrezze and Frank Wagner supported Rose Lovano for the position of ward leader.

As this case represents only an application of clear and previously existing constitutional precedent from this Honorable Court, Defendant asserts Plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN T. MCLANDRICH
Counsel of Record
TODD M. RASKIN
MAZANEC, RASKIN
& RYDER CO., L.P.A.
Attorneys for Respondent
Thomas J. Longo
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139
(440) 248-7906

Supreme Court, U.S.
FILED
APR 15 1999
CLERK

No. 98-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK WAGNER,

Petitioner,

v.

JAMES P. CELEBREZZE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JUDGE JAMES P. CELEBREZZE

ELIZABETH A. MCCORD
Counsel of Record
GEORGE D. JONSON
MONTGOMERY, RENNIE & JONSON
Attorneys for Respondent Judge James P. Celebrezze
36 East Seventh Street
Suite 2100
Cincinnati, Ohio 45202
(513) 241-4722

152452

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

1988

QUESTIONS PRESENTED FOR REVIEW

1. Did the district court and court of appeals correctly analyze plaintiff-petitioner's employment claim under the political patronage framework of *Branti v. Finkel*, 445 U.S. 507 (1980), and its progeny?

2. Did the district court and the court of appeals correctly conclude plaintiff-petitioner's discharge did not violate his First Amendment rights?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 4

I. Because Wagner's Political Affiliation Lay At The Heart Of His Discharge, The Courts Below Correctly Analyzed Wagner's Claim Under A Political Patronage Framework. 5

II. Because "Political Affiliation" Applies To The Kind Of Political Differences In This Case, And Because Wagner Was A Confidential Employee, The Courts Below Correctly Concluded Judge Celebrezze Could Terminate His Bailiff For Actions Detrimental To The Judge's Political Interests. 10

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Balogh v. Charron, 855 F.2d 356 (6th Cir.), *reh'g denied* (1988) 5, 10, 11, 13

Branti v. Finkel, 445 U.S. 507 (1980) ..... *passim*

Connick v. Myers, 461 U.S. 138 (1983) 7, 8, 16

Elrod v. Burns, 427 U.S. 347 (1976) 4, 5, 6, 7, 8, 9, 10, 12, 16

Faughender v. City of North Olmsted, Ohio, 927 F.2d 909 (6th Cir. 1991) 11, 12

Lewis v. Cohen, No. 97-7895, 1999 U.S. A. LEXIS 585 (2d Cir. Jan. 15, 1999) 7, 8, 9

Marshall v. Porter County Plan Commission, 32 F.3d 1215 (7th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995) 8, 9

McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996) ... 6, 12

McEvoy v. Spencer, 124 F.3d 92 (2d Cir. 1997) 8

Mumford v. Zieba, 4 F.3d 429 (6th Cir. 1993), *cert. denied, Mumford v. Basinski*, __ U.S. __, 118 S. Ct. 298 (1997) 12, 14

Cited Authorities

Page

Newman v. Voinovich, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, 509 U.S. 924 (1993) 5

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996) 5

Pickering v. Board of Education, 391 U.S. 563 (1968) 7, 8, 9, 16

Rahn v. Drake Center, 31 F.3d 407 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) 9

Rice v. Ohio Dept. of Transportation, 14 F.3d 1133 (6th Cir. 1994) 4

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 5

Waters v. Churchill, 511 U.S. 661 (1994) 15

Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990) 11

United States Constitution:

First Amendment ..... i, 7, 9, 11, 15

STATEMENT OF THE CASE

This is a case about political loyalty. Beginning in November 1990, petitioner Frank Wagner served as bailiff to the Honorable James P. Celebrezze, an elected judge of the Cuyahoga County, Ohio, Court of Common Pleas, Division of Domestic Relations. In early 1994, Wagner began to take political action that was directly in conflict with the judge's political interests. Judge Celebrezze requested, then demanded, that Wagner curtail this detrimental political activity. When Wagner refused, he was terminated.

Wagner had been in politics before he became Judge Celebrezze's bailiff. He had been a council member for the City of Garfield Heights (a suburb of Cleveland, Ohio). He had also served on the Garfield Heights Board of Education, both as a member and president, and was a member of that Board when he was hired as Judge Celebrezze's bailiff. Upon becoming bailiff, Wagner undertook other political endeavors after first obtaining Judge Celebrezze's permission.

In January 1993, Wagner met with Judge Celebrezze to seek his approval before declaring his candidacy for Mayor of Garfield Heights. Judge Celebrezze did approve and, in fact, encouraged Wagner's candidacy. The judge's brother, Frank Celebrezze, contributed to Wagner's campaign for mayor, which pitted Wagner against Thomas Longo. Ultimately, Wagner lost to Longo by less than five percent of the vote.

After the election in November 1993, Judge Celebrezze suggested Wagner run a slate of candidates for the Garfield Heights Democratic Central Committee, an arm of the local political party. To do this, Wagner had many meetings with Judge Celebrezze, who monitored the progress of fielding candidates and encouraged Wagner to run a full slate. With Judge Celebrezze's help, Wagner organized candidates to circulate and file petitions in almost every ward and precinct in Garfield Heights for the office of the Democratic Central Committee.

In the Spring of 1994, Wagner decided to run against Rose Lovano for Ward Leader of Garfield Heights, but now-Mayor Longo (who had previously defeated Wagner in the mayoral race) did not want Wagner opposing Lovano. In another race at that time, Frank Celebrezze, Judge Celebrezze's brother, was running for judge of the Court of Appeals of the Eighth Appellate District of Cuyahoga County, Ohio.

In order to remove Wagner as a candidate against Lovano, in March 1994, Longo threatened to support another candidate against Frank Celebrezze for the appellate judgeship if Judge Celebrezze could not convince Wagner to withdraw from the Ward Leader's race and endorse Lovano. Upon realizing the adverse consequences of Wagner's political activities, Judge Celebrezze told his bailiff to make peace with Longo and attempt to get Longo to sign a card endorsing his brother Frank for the court of appeals. From April 7, 1994, through April 25, 1994, Judge Celebrezze repeatedly asked his bailiff to withdraw from the Ward Leader race and throw his support to Rose Lovano.

During this time, Wagner began surreptitiously tape recording conversations he had with the judge, and these transcriptions[1] reflect the judge's repeated attempts to convince his bailiff to support Lovano so the judge would not suffer adverse political repercussions. For instance, in a telephone conversation of April 23, 1994, Judge Celebrezze told Wagner:

> Frank, listen to me. Do not put me in the middle. And do not make a liar out of me or my brother . . . . Especially when you are dealing with an individual who has made it his business to screw me because I wouldn't fire you and give his girlfriend a job. You'd better think about that and we'll talk about it on Monday . . . .

---

1. The transcriptions were never properly authenticated by Wagner; however, Judge Celebrezze did not contest their admissibility for purposes of the dispositive motion.

Nevertheless, throughout these discussions, Wagner refused to endorse Lovano (although he agreed not to run), despite his judge's concerns that Wagner's actions would detrimentally affect Frank Celebrezze's race and, ultimately, the judge's own political future.

Concerned that Wagner was not being straightforward, on May 25, 1994, Judge Celebrezze asked Wagner to sign a note addressed to Rose Lovano that read,

> Just a brief note to let you know that whatever the outcome of the next Tuesday election, I will do all in my power to see my people and I support you in remaining Ward Leader of Garfield Heights.

Wagner refused to sign the note and more discussions ensued between the judge and Wagner. Judge Celebrezze continued to explain that he did not trust Wagner and reiterated, "Unless . . . Rose Lovano gets re-elected, I got a major headache." The judge emphasized to Wagner:

> You put me in an untenable position, this is how I get out of it. Your job is, like I told you yesterday and I've told you before, your first job is to get me re-elected — not get me canned. It's just that simple. You're running, you're trying to bull shit people — now please — I'm not — I'm not stupid — you're trying to bull shit me that you ain't gonna run, I know what you're up to . . . . And I'm not gonna have it happen.

Thus, Judge Celebrezze presented Wagner with a choice: Either put in writing he would support Lovano or lose his job. That way, if Wagner refused to support Lovano, the judge could say to Mayor Longo he had done everything he could to get Wagner's support.[2] Importantly, if Wagner was no longer the

---

2. The transcript of the judge's comments reads as follows:

> I got no control over you — you don't work for me any more —"Mayor I'm sorry. I did everything I could" — you go out

(Cont'd)

judge's bailiff, then Wagner's actions would no longer be viewed as a reflection of the judge's politics. So after Wagner repeatedly refused to go along with his judge's directions, Judge Celebrezze terminated him.

As the United States District Court for the Northern District of Ohio and the Sixth Circuit found, Judge Celebrezze terminated Wagner because his political affiliations worked against the judge's political interests. (A. 30; A. 9).[3] As the Sixth Circuit emphasized, Wagner's political affiliation "lay at the heart of his discharge." (A. 9). It is worth noting that both the district court and the Sixth Circuit had before it only the allegations of the complaint and supporting material submitted by petitioner Frank Wagner (in particular, a long affidavit and the unauthenticated transcripts). Presumably, Wagner presented the supplementary material to bolster his claim that he was terminated solely for engaging in politically protected speech. However, both the district court and the Sixth Circuit referenced the supplementary material to underscore that Wagner was appropriately terminated for insisting on a political affiliation that was adverse to Judge Celebrezze's.

REASONS FOR DENYING THE WRIT

"All politics is local," former Speaker of the House, Tip O'Neill once said. Recognizing the wisdom of this comment, the Sixth Circuit Court of Appeals borrowed Speaker O'Neill's aphorism in *Rice v. Ohio Dept. of Transportation,* 14 F.3d 1133, 1141 (6th Cir. 1994), as an apt description of certain public employment situations. The Sixth Circuit, following this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S.

(Cont'd)

> and screw him [*i.e.*, Longo], if that's what you want — go do it, I'm not changing my mind[.] I told you that three times yesterday, — my brother told you that, and I told you that again last night. I told you — I think I've told you enough.

3. "A." citations refer to the material appended to Wagner's Petition for Writ of *Certiorari*.

507 (1980), and *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), has uniformly recognized that, where politics and an employee's position are significantly intertwined, then those politics provide the appropriate factor for analyzing politically motivated, adverse employment action. This case, more than most, illustrates the paramount importance of political loyalty where local politics play a central role in the employer's public support.

I.

BECAUSE WAGNER'S POLITICAL AFFILIATION LAY AT THE HEART OF HIS DISCHARGE, THE COURTS BELOW CORRECTLY ANALYZED WAGNER'S CLAIM UNDER A POLITICAL PATRONAGE FRAMEWORK.

Ohio judges, as elected officials, are subject to the political pressures of elected office. In fact, the Sixth Circuit has specifically recognized Ohio governors may consider an individual's political party when appointing interim Ohio judges, because judges' elected status implies a political component as one job requirement. *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, 509 U.S. 924 (1993). Accordingly, the Sixth Circuit has also recognized Ohio judges have a valid interest in political loyalty from their employee bailiffs, *Balogh v. Charron*, 855 F.2d 356 (6th Cir.), *reh'g denied* (1988), because this "is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

Nevertheless, Wagner first contends the constitutional dimensions of his discharge should not have been analyzed under *Elrod-Branti* — the *Balogh* holding notwithstanding — because (1) Judge Celebrezze was not a newly elected public official cleaning house after assuming office, and (2) Judge Celebrezze and Wagner belonged to the same political party. (Petition for Writ of *Certiorari*, p. 13) ("Petition"). But Wagner's first contention ignores one of the clear mandates of *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74-76 (1990), that an *Elrod-Branti* analysis reaches patronage practices other than new office-holder

dismissals. Thus, in keeping with this Court's precedents, the Sixth Circuit has recognized political patronage dismissals are appropriate, even where individuals of the same political party hold different views or are only mere rivals. *See, e.g., McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), and Section II below. Judge Celebrezze's actions, then, must be evaluated within the *Elrod-Branti* line of cases because Wagner's politics were the reason for his discharge.

Wagner alleged and asserted by way of affidavit that, while bailiff, he was actively involved in the local political scene, first, running for and losing the Garfield Heights mayoral election, and, second, seeking the office of Garfield Heights Ward Leader of the Democratic Party. (Part of his political activities also included organizing and running a slate of candidates for the Democratic Central Committee, for the purpose of taking control of the local political party.) However, Mayor Thomas Longo supported another candidate for the Ward Leader position and expected Judge Celebrezze's support for Lovano. If Judge Celebrezze and his bailiff did not support Lovano, then Longo and his constituents would not support Judge Celebrezze's brother in his bid for an appellate court seat. Recognizing that what goes round, comes round, Judge Celebrezze told his bailiff that, if he continued in political activities ultimately contrary to the judge's interests, then Wagner could no longer serve as his bailiff.

Wagner next contends the lower court's decision has contributed to a split among the circuit courts of appeal by requiring "the patronage analysis to be applied to almost any discharge rooted in politics." (Petition, p. 11). This is not an accurate interpretation of the lower court's decision.

The Sixth Circuit expressly premised its analysis of Wagner's claim on a specific parameter: "[P]olitical patronage employees may be terminated for *purely* political reasons." (A., p. 6) (emphasis added). Based on the record — supplied entirely by Wagner himself — the Sixth Circuit found:

> Wagner was discharged because his political affiliations ran contrary to the Judge's political interests, and so his dismissal should be analyzed under the political patronage doctrine.

(A., p. 8). The Sixth Circuit emphasized, "[T]he record does not support Wagner's claim that he was fired simply for exercising his First Amendment right to refuse to speak out on a matter of public concern." *Id.* Thus, it is very clear the lower court did not hold the patronage analysis of *Elrod-Branti* must be applied to *any* discharge even tangentially connected to politics. Rather, because the lower court specifically found Wagner's discharge was the result of his political affiliations, the lower court then correctly applied the *Elrod-Branti* political patronage analysis. Wagner's inference that the Second and Seventh Circuits would reach a contrary conclusion is simply not correct.

Wagner cites *Lewis v. Cohen*, No. 97-7895, 1999 U.S. A. LEXIS 585 (2d Cir. Jan. 15, 1999), to support his contention that *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny provide the appropriate analytical framework for his discharge. (Petition, p. 11). The *Lewis* court held a senior policymaking employee could be terminated by the employer agency for refusing to publicly support a policy change. *Id.* at *26. In reaching its decision, the court noted part of the dismissed employee's job was to communicate with the media and the public as the official spokesperson for the agency. *Id.* at *5. Before his dismissal, the employee had publicly criticized some agency decisions and refused to endorse a newly implemented policy. *Id.* at *6-7. The Second Circuit therefore used the *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), free speech analyses to conclude the defendant agency's interest in effective and efficient operations outweighed the dismissed employee's First Amendment interest in refusing to endorse the policy changes. *Id.* at *26. The *Lewis* court did not use an *Elrod-Branti* analysis because the *Lewis* facts involved discrete incidents of speech rather than political affiliation. *Id.* at *20. Because neither politics nor political

affiliation played *any* role in the case, the *Lewis* court correctly applied the *Pickering* analysis.

Moreover, the *Lewis* court specifically acknowledged that, under *Elrod* and *Branti*,

> consistent with the First Amendment, a policymaking employee may be discharged on the basis of political affiliation such as membership (or lack of membership) in a particular party. . . .

Id. at *20. So, contrary to Wagner's inference, the *Lewis* court did not advocate a *Pickering* analysis when political affiliation is the reason for discharge; the court simply upheld the Second Circuit's rule that,

> [w]here the evidence shows that the employer discharged a policymaker solely for speaking out on matters of public concern, and . . . the *policymaker's political beliefs played no role* in the employer's decision, Elrod is inapplicable and Pickering must be applied. . . .

Id. at *20-21 (quoting *McEvoy v. Spencer*, 124 F.3d 92, 101 (2d Cir. 1997)) (emphasis added). In contrast to *Lewis*, the lower court in this case found Wagner was discharged specifically because of his political beliefs. (A., p. 8). Therefore, the Second Circuit's *Pickering* analysis in *Lewis* is immaterial to this case which clearly involves political affiliation.

Wagner also cites the Seventh Circuit case of *Marshall v. Porter County Plan Commission*, 32 F.3d 1215 (7th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995). In *Marshall,* the court used a *Pickering-Connick* analysis to determine whether the plaintiff Marshall's discharge was proper. *Id.* at 1219. (Marshall, a policymaker, was discharged for speaking about improprieties of her office. *Id.)* Similar to the Seventh Circuit in *Lewis,* but unlike the case before this Court, the evidence in *Marshall* did not suggest

Marshall was terminated because of partisan politics. *Id.* at 1221. In fact, in *Marshall*, the employer did not even argue Marshall was discharged for her political affiliations, or for not supporting a certain candidate. *Id.* However, the Seventh Circuit remarked that it would apply an *Elrod-Branti* analysis "when the plaintiff's politics are implicated in the discharge. . . ." *Id.* But because the *Marshall* facts did not raise political affiliation concerns, the court properly applied the *Pickering* analysis to the *Marshall* facts. Therefore, neither *Marshall* nor *Lewis* is useful in this case because Wagner's termination unquestionably involved political affiliation. What is clear from the *Lewis* and *Marshall* cases is that the Second and Seventh Circuits, respectively, do in fact use the *Elrod-Branti* analysis to determine if a discharge is proper, when the discharge is based upon political affiliations.

Additionally, Wagner cites a Sixth Circuit case, *Rahn v. Drake Center*, 31 F.3d 407, 411 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995), to support his contention that his claim should be analyzed under *Pickering*. (Petition, p. 15). However, *Rahn* is no more helpful than *Lewis* or *Marshall*, because, again, political affiliation played no part in that plaintiff's termination.

The question in *Rahn* was whether the plaintiff was discharged for unauthorized absences or in retaliation for her writing a press release publicly criticizing her employer. *Id.* at 409-11. The court determined a two-step analysis was appropriate to decide whether the plaintiff was terminated for exercising her First Amendment right. Initially, the court had to determine whether the speech (*i.e.*, the press release) was on a matter of public concern. *Id.* at 411. If the speech was found to relate to a matter of public concern, then the court would conduct a *Pickering* balancing test. *Id.* Because political affiliation played absolutely no role in Rahn's termination, the court appropriately did not consider an *Elrod-Branti* analysis. Interesting as this case may be, it in no way supports Wagner's position that *Pickering* is the appropriate analytical framework for his case — where political affiliation was at the heart of his discharge.

The Sixth Circuit's decision below, therefore, solidly premised on the facts of this case, neither contradicts this Court's or the Sixth Circuit's previous decisions, nor contributes to a purported split among the circuit courts of appeal, despite Wagner's sounding the alarm. (Petition, p. 11). As the Sixth Circuit described:

> The record does not support Wagner's claim that he was fired simply for exercising his First Amendment right to refuse to speak out on a matter of public concern. Wagner's limited focus on his refusal to sign the letter supporting Lovano for Party Ward Leader misrepresents the record. Judge Celebrezze terminated Wagner because he believed that they no longer enjoyed the requisite commonality of political purpose and support, as ultimately evidenced by Wagner's refusal to sign the letter.

(A., p. 8). In other words, the Sixth Circuit found Wagner's refusal to sign a note endorsing Rose Lovano was but one facet of a series of political interactions leading up to his termination. Thus, the district court and the court of appeals correctly analyzed Wagner's termination under the *Elrod-Branti* framework.

II.

BECAUSE "POLITICAL AFFILIATION" APPLIES TO THE KIND OF POLITICAL DIFFERENCES IN THIS CASE, AND BECAUSE WAGNER WAS A CONFIDENTIAL EMPLOYEE, THE COURTS BELOW CORRECTLY CONCLUDED JUDGE CELEBREZZE COULD TERMINATE HIS BAILIFF FOR ACTIONS DETRIMENTAL TO THE JUDGE'S POLITICAL INTERESTS.

Applying the *Branti* standard, in 1988, the Sixth Circuit Court of Appeals held a judge could discharge his bailiff for purely political reasons because the bailiff was a confidential employee. *Balogh v. Charron*, 855 F.2d 356 (6th Cir.), *reh'g denied* (1988). The Sixth Circuit noted bailiffs work in chambers and are assigned

to only one judge as court officer and general assistant. Bailiffs normally handle sensitive and non-public information about cases of a confidential nature, so the judge must be able to rely on the confidentiality of the relationship with his bailiff. Thus, the Sixth Circuit held it was not a violation of First Amendment rights for a judge to terminate his bailiff's employment because of the bailiff's political affiliation.[4] *Id.* at 356.

In *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990), the Sixth Circuit elaborated on its definition of "political affiliation," emphasizing political affiliation "has been understood to apply to political differences of any kind, not merely differences in party membership." *Id.* at 153, fn. 4. Finding a city attorney did not enjoy First Amendment protection against politically motivated dismissal, the *Williams* court defined "political affiliation" to include "commonality of political purpose and support, not [just] political party membership." *Id.*

Two years later, the Sixth Circuit again visited the question of politically motivated termination and held a new mayor's politically motivated refusal to rehire the old mayor's secretary did not violate the secretary's First Amendment rights. *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909, 913-14 (6th Cir. 1991). Again, the Sixth Circuit employed a broad definition of what constitutes permissible politically motivated dismissals when it noted:

> Any reference to "political motivations" should not be read as synonymous with partisan political motivations. As we noted in *Williams*, "the reasoning of the Supreme Court in [*Branti*] has been understood to apply to political differences of any kind, not merely differences in party membership. . . ." [*citation omitted*] The political motivations underlying this case are personal, not partisan, but this does not remove them from examination under *Branti*.

---

4. In *Balogh*, the bailiff had supported the judge's political opponent.

Id. at 914, fn. 2. The "personal political differences" of the *Faughender* case are similar to Wagner's claims against Judge Celebrezze, as Ms. Faughender lost her job because of the personal relationships of the political officers involved.[5]

The Sixth Circuit has continued to hold a government employee can be discharged because of his or her political affiliation if political affiliation is an appropriate requirement for the effective performance of the public office involved. *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993), *cert. denied*, *Mumford v. Basinski*, __ U.S. __, 118 S. Ct. 298 (1997). Likewise, the Sixth Circuit has continued to hold "political affiliations" should be broadly construed to mean "commonality of political purpose and support, not solely political party membership." *Id.* at 433 fn. 9.

Throughout this litigation, Wagner's fall-back argument has been that, even if *Elrod* and *Branti* apply, based on his actual responsibilities he could not be discharged for political patronage reasons because he was not a confidential employee. However,

---

5. While working first as secretary to the safety director of North Olmsted, the safety director asked Ms. Faughender to take the job of secretary to the mayor. As the Sixth Circuit noted,

> This job became available because then-Mayor Robert Swietyniowski . . . was marrying his prior secretary, an act which caused much commotion in North Olmsted and ultimately caused the mayor to lose his bid for re-election in 1985. Faughender was initially reluctant to enter into this squall, but finally took the job.

Id. at 910-11. Mr. Swietyniowski lost his bid for re-election in the Democratic primary, and the ensuing Democratic nominee lost to the ultimate winner, Republican Yvonne Petragic. New Mayor Petragic in part decided not to rehire Ms. Faughender because she was friends with the old mayor's new wife. The Sixth Circuit therefore found Ms. Faughender was not rehired for politically motivated reasons, but that, as a confidential employee, these reasons were permissible.

the Sixth Circuit has held as a matter of law that bailiffs, as a category, are confidential employees:

> We agree with the decision of District Judge Avern Cohn . . . , that **the bailiff to the judge, like an administrative or legislative aide to a legislator, is a confidential employee**. As a judicial aide, this confidential relationship arises because he handles sensitive communications for the judge, acts as his bodyguard and may discuss and learn about the outcome of cases pending before the judge before the decision is announced to the public.

Balogh, 855 F.2d at 356 (*emphasis added*). In *Balogh*, then, the Sixth Circuit created a precedent binding to a classification of all bailiffs, including Wagner in this case.

Moreover, Wagner's job duties — as described by him alone — indicate he engaged in the kind of activities contemplated by the *Balogh* court. Wagner attested he administered Judge Celebrezze's docket, scheduled hearings and trials, set up attorney-judge conferences, handled calls and "otherwise screened persons wishing to make contact with the Judge," opened and closed court, and swore in witnesses. From this description alone, it is evident Wagner was privy to the particulars of proceedings and information not available to the general public.[6] For example, through Wagner, parties sought hearings on motions. Thus, as Judge Celebrezze's bailiff, Wagner knew when a party needed to schedule an emergency (versus a routine) hearing, the nature of the controversy, and other matters not generally brought to the public's attention. Additionally, as the person who screened Judge Celebrezze's calls, he knew to whom the judge wished to speak, to whom he did not, and otherwise how to direct the judge's communication.

---

6. This Court can judicially notice that, as a Common Pleas Domestic Relations judge, Judge Celebrezze presided over matters involving some of the most sensitive kind of litigation.

Thus, the Sixth Circuit correctly concluded Judge Celebrezze did not violate Wagner's constitutional rights when he terminated Wagner because he was a confidential employee for whom political loyalty was a legitimate requirement. In arguing to the contrary, Wagner suggests the lower courts should have asked whether Wagner's activities would have interfered with his or the judge's discharge of their public duties. (Petition, p. 17). He contends it "should have been self-evident to the lower courts" the judge's demands[7] "could never be deemed 'an appropriate requirement for the effective performance of [Domestic Relations Court].' "[8] (Petition, pp. 17-18). However, the Sixth Circuit has specifically held otherwise.

In *Mumford v. Zieba*, 4 F.3d at 434, the Sixth Circuit expressly recognized that animosities arising from political opposition can result in the inefficient operation of government. As the transcripts reflect, Wagner's continued refusal to back off from his personal political pursuits created tremendous friction with his judge. Judge Celebrezze's description of his concerns — that he did not want to be put in the middle of a political tug-of-war, that he did not want to lose political support from Mayor Longo and others — reflects he discharged his bailiff for reasons directly related to the eroding trust between the judge and his bailiff. Because their relationship was a close, confidential one, any distrust or personal animosity would significantly impair the efficient operation of the court.

The lower courts correctly gave deference to Judge Celebrezze's response to his bailiff's actions, based on the

---

7. Again, Wagner incorrectly focuses only on the Lovano note (*i.e.*, the job requirement was "forcing Wagner to sign a statement vocalizing support for a political candidate in a suburban ward leader race. . . ."). (Petition, p. 17).

8. Because court bailiffs have already been designated confidential employees, the Sixth Circuit has already asked and answered the question.

consequences the judge perceived.[9] Thus, it is specious for Wagner to assert the lower courts should not have found Wagner's political loyalty was an appropriate requirement for the effective performance of the court. The district court and the court of appeals correctly concluded Wagner's disloyalty caused his termination, and his termination was not a violation of his First Amendment rights.

---

9. In 1994, this Court acknowledged that governmental employers must be allowed to make employment decisions they feel are in their best interests and that a court, in reviewing such a decision, must apply the law to the facts as the employer thought them to be if the court finds the employer's conclusions were reasonable. *Waters v. Churchill*, 511 U.S. 661 (1994).

CONCLUSION

Wagner asks this Court to consider whether the lower courts should have applied the familiar "balancing of interests" test of *Pickering* and *Connick* to his discharge. However, the factual record before this Court shows the lower courts did not misconstrue or overemphasize the political nature of Wagner's employment and termination. Consequently, despite Wagner's attempts to paint the situation differently, the record as a whole shows the Sixth Circuit correctly applied *Elrod-Branti* and their progeny, and correctly concluded Judge Celebrezze was well within his rights when he terminated Wagner for his political action.

As this case does not present any unsettled question of constitutional law, respondent Judge James P. Celebrezze respectfully requests petitioner Frank Wagner's Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

ELIZABETH A. MCCORD
Counsel of Record
GEORGE D. JONSON
MONTGOMERY, RENNIE & JONSON
Attorneys for Respondent
Judge James P. Celebrezze
36 East Seventh Street
Suite 2100
Cincinnati, Ohio 45202
(513) 241-4722